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IN THE

Supreme Court of the United States

October Term, 1958

No. **242**

WIRL TELEVISION COMPANY, *Petitioner,*

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, ILLIWAY TELEVISION, INC.; WMBD, INC.; TELE-VIEWS NEWS COMPANY; AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.; WEST CENTRAL BROADCASTING COMPANY; HILLTOP BROADCASTING COMPANY; and MID ILLINOIS TELEVISION COMPANY, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

TIMOTHY W. SWAIN
MISHAEL O. GARD
Counsel for Petitioner
912 Central National
Bank Building
Peoria, Illinois

Of Counsel:

SWAIN, JOHNSON, GARD & CATION
912 Central National Bank Bldg.
Peoria, Illinois

INDEX

	Page
Citations to Opinions Below	2
Jurisdictional Statement	2
Questions Presented	2
Constitutional Provisions and Statutes Involved	4
Statement of the Case	4
Reasons for Allowance of the Writ	13
I. The Circuit Court of Appeals in affirming the action of the Commission has sanctioned such a clear departure from the express terms of section 307(b) of the Communications Act as to call for an exercise of this court's power of supervision	13
II. The action of the Commission deleting Channel 8 from Peoria, over the protests of the petitioner, who had prosecuted a long, comparative hearing in reliance upon the assignment of said channel and over the protests of a substantial portion of the public, was so arbitrary, capricious and discriminatory as to call for the exercise of this court's power of supervision	21
III. The denial by the Commission of petitioner's request for a full evidentiary hearing on the question of the deletion of Channel 8 was in such complete violation of the Fifth Amendment of the United States Constitution, the Communications Act, and the Administrative Procedure Act, as to call for corrective supervision of this court	27
Conclusion	38
Petitioner's Appendix "A"	1a
Petitioner's Appendix "B"	7a

TABLE OF AUTHORITIES

CASES: Page

Burton v. United States, 202 U.S. 344 55
Carroll Broadcasting Co. v. F.C.C., decided July 10, 1958 (not yet reported) 20
Coastal Bend Television Company v. F. C. C., 234 F. 2d 686 .....17, 38
F.C.C. v. Allentown Broadcasting Corp., 349 U.S. 358 .....14, 20, 39
F.C.C. v. Sanders Brothers Radio Station, 309 U.S. 470 .....14, 19, 21, 38
Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co., 289 U.S. 266 .....14, 19
Gerico Investment Co. v. United States, 240 F. 2d 410 38
Jacksonville Journal Co. v. F.C.C., 246 F. 2d 699 38
Logansport Broadcasting Corp. v. United States, 210 F. 2nd 24, 27 (1954) 17
Sangamon Valley Television Corp. v. United States of America, 255 F. 2d 191 20
Springfield Television Broadcasting Corp. v. F.C.C., U.S.C.A.D.C. June 19, 1958 (not reported) ...22, 27, 38
Van Curler Broadcasting Corp. v. United States, 236 F. 2d 727 38
WIRL Television Company v. F.C.C., 253 F. 2d 863 13, 25, 38
Winnebago Television Corp. v. United States of America, U.S.C.A.D.C. July 2, 1958 (not reported) 22, 27, 38

DECISIONS OF THE FEDERAL COMMUNICATIONS COMMISSION:

Memorandum Opinion and Order, FCC 54-1386, No. 12101 8
Notice of Proposed Rule Making, FCC 55-406, No. 17475 8
Report and Order (Elmira, March 1, 1957) 22 FCC 307, 15 Pike and Fischer, Radio Reg. 1515 22
Report and Order (Evansville, March 1, 1957) 22 FCC 382, 15 Pike and Fischer, Radio Reg. 1573 ... 23
Report and Order (Fresno, March 1, 1957) 22 FCC 365, 15 Pike and Fischer, Radio Reg. 1586e 23

Page

Report and Order (Hartford, March 1, 1957) 22 FCC 332, 15 Pike and Fischer, Radio Reg. 1540 i 22
Report and Order (Madison, March 1, 1957) 22 FCC 356, 15 Pike and Fischer, Radio Reg. 1563 22
Report and Order (New Orleans, March 1, 1957) 22 FCC 396, 15 Pike and Fischer Radio Reg. 1603 .. 22
Report and Order (Peoria, March 1, 1957) 22 FCC 342, 15 Pike and Fischer, Radio Reg. 1550c 2
Report and Order (Nov. 11, 1955) 13 Pike and Fischer, Radio Reg. 1511 .....8, 23, 29
Report and Order (Second Report on Deintermixture) (June 26, 1956), 13 Pike and Fischer Radio Reg. 1571 .....9, 10, 15, 16, 22
Sixth Report and Order, 1 Pike and Fischer, Radio Reg. 91:601 .....5, 6, 13, 17, 24, 26, 35
WMBD, Inc., (Peoria, June 29, 1956) 11 Pike and Fischer, Radio Reg. 533 ..... 2, 7
WMBD, Inc., (Peoria, May 17, 1957) 22 FCC 1039, 11 Pike and Fischer, Radio Reg. 609 .....2, 12

CONSTITUTIONAL PROVISION AND STATUTES:

Amendment V of the Constitution of the United States 4, 32
Federal Communications Act of 1934, as amended, 48 Stat. 1064, 47 U.S.C.A. 151, et seq.:

Section 303 (f) 4, 28, 30
Section 303 (g) 4, 17, 39
Section 307 (b) 3, 4, 6, 12, 13, 14, 15, 16, 17, 18, 20, 24, 36, 39
Section 309 (b) 4, 30
Section 316 .....4, 23, 28, 29

Administrative Procedure Act, 60 Stat. 237, 5 U.S.C.A. 1001, et seq.:

Section 2 (c) 4, 31
Section 2 (d) 4, 30, 31
Section 2 (e) 4, 31
Section 5 .....4, 31
Section 7 .....4, 31
Section 8 .....4, 31

OTHER AUTHORITIES: Page

Vol. 43 American Jurisprudence, Section 260, page 77 34
Vol. 67 Corpus Juris Secondum, Section 116 34
Television Inquiry Committee on Interstate and Foreign Commerce, 84th Cong., 2d Sess. pursuant to S. Res. 13 and 163, Parts I and II 9, 10
Transcript of the Hearings of the Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce, May 26, 1958 (not reported) 35

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled proceedings on March 27, 1958, on which a hearing was denied May 5, 1958.

CITATIONS TO OPINIONS BELOW

Three orders of the Federal Communications Commission are involved in this proceeding. They are as follows:

1. Decision released June 29, 1956 granting Petitioner, WIRL Television Company, a construction permit for Channel 8 in Peoria, Illinois but attaching certain conditions thereto. Joint Appendix 128-130; 11 *Pike and Fischer Radio Regulations* 533, 607-608 (hereafter referred to as "*R. R.*").

2. Report and Order released March 1, 1957 which Order deleted VHF Channel 8 from Peoria, Illinois and substituted therefor UHF Channels 25 and 31. J. A. 109-126; 22 F. C. C. 342; 15 *R. R.* 1550 C (1957).

3. Memorandum Opinion and Order released May 17, 1957 denying Petition for Reconsideration of conditions attached to construction permit and providing that Petitioner should operate on UHF Channel 25 instead of VHF Channel 8. J. A. 131-137; 22 F. C. C. 1039; 11 *R. R.* 609.

The Opinion of the Circuit Court of Appeals affirming the above orders and decision is appended hereto as Petitioner's Exhibit A, reported at 253 F. 2d 863 (1958).

JURISDICTION

The jurisdiction of this Court is invoked under Section 1254 (1) of Title 28 of the United States Code and section 402 (J) of Title 47 of the United States Code. The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered in its cases No. 13,768, 13,769 and 13,912, all having been consolidated by orders of that Court on March 27, 1958. Rehearing was denied on May 5, 1948.

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission's action in deleting the only VHF television channel (Channel 8) which had been assigned to Peoria, Illinois, from

that city and reassigning it to Davenport, Iowa, Rock Island-Moline, Illinois, a smaller market which already had two VHF channels, violated section 307 (b) of the Communications Act. In other words, was the Commission's action in "equalizing the competitive situation" in Peoria for the benefit of Peoria's UHF operators by means of deleting VHF Channel 8, carrying out the statutory mandate of section 307 (b) which provides for a fair, efficient and equitable distribution of radio service among the several States and communities.

2. Whether the Commission's action in deleting Channel 8 from Peoria was arbitrary, capricious and discriminatory.

3. Whether the Commission denied Petitioner the type of hearing it was entitled to under the Communications Act, the Administrative Procedure Act, and the Constitution of the United States. That is, whether the Commission having once granted a construction permit to Peoria for Channel 8 can summarily take away that permit without a full evidentiary hearing.

4. Whether it is in the public interest under the Communications Act, and whether the provisions of said Act have been complied with, for United States Senator Robert S. Kerr of Oklahoma, principal owner of UHF Station, WEEK-TV, Channel 43, Peoria, Illinois (who turned in a VHF grant for Peoria in 1948) and who had the opportunity but failed to compete in a contested hearing for Channel 8 in Peoria, Illinois, to now, after Petitioner WIRL Television Co. of Peoria has spent approximately five years in long, expensive ordeals of hearings before the Commission who has won the channel in a comparative hearing in the American Way, succeed in his efforts and through his influence, power, and prestige as a United States Senator to have VHF Channel 8, an admittedly superior channel, taken away from the second largest city in Illinois, and moved to a smaller market with less population that already had 2 VHF channels, after the Commis-

table" distribution of section 307(b) of the Communications Act.[3]

Conceding that VHF was a superior service technically, the Commission was careful to assure the maximum benefits from VHF by distributing the 12 VHF channels as broadly as possible. Since VHF could effectively cover large areas, VHF was used in the metropolitan centers such as Peoria.[4] Nowhere in the Sixth Report was there ever a suggestion that equalization of competition, as such, was a proper criterion of section 307(b). As a matter of fact, the Commission expressly refused to adopt a similar principle.[5]

In reliance upon these so-called "final" rule making proceedings, Petitioner WIRL filed its application for VHF Channel 8 at Peoria on June 30, 1952 even though it knew it faced a long, costly comparative hearing with another applicant,[6] and even though the less desirable UHF Channels could have been had with little or no contest.

The respondents, West Central Broadcasting Company and Hilltop Broadcasting Company, elected not to compete for Channel 8 and acquired without opposition Peoria UHF Channels 43 and 19 respectively. Respondent West Central is owned and controlled by United States Senator Robert S. Kerr, of Oklahoma, his family and associates. Respond-

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[3] Id. 91:664.

[4] Id. 91:621.

[5] Allen B. DuMont Laboratories, Inc., proposed a plan designed to assure the assignment of four VHF channels to the major metropolitan areas, which objective was openly related to DuMont's need for competitive equality in network facilities (1 *R.R.* 91:622-91:623). The Commission rejecetd this proposal and found that equitable distribution of these valuable VHF frequencies to all the States was paramount to economic considerations (1 *R.R.* 91:624).

[6] Respondent WMBD, Inc.; a third applicant filed but dropped out before hearings began.

ent Hilltop is owned by the Peoria Journal-Star, Incorporated, which company publishes the only daily newspaper in Peoria. Both stations have been in operation since 1953 and, with sound financial backing and influence, enjoy a position of stability and importance in the community. Neither station, however, due to the limited coverage of UHF television, covers fully the large Peoria trading area.

Petitioner, meanwhile, was engaged in a lengthy, arduous and expensive competitive hearing for Channel 8. The hearing commenced in the summer of 1953 with extensive depositions in Peoria, took a month's time in hearing in Washington, D. C. and was finally concluded in December of that year. The record comprises over 2700 pages of transcript and 1300 pages of exhibits. The initial decision favoring the Petitioner's application was not issued until almost one year later and not until June 29, 1956, *two and one-half years* after the closing of the record, did the Commission confirm the examiner's decision and grant petitioner a construction permit for Channel 8.[7]

Although the UHF operators in Peoria were fully cognizant when they acquired their licenses and commenced broadcasting that they would face eventual competition from Channel (8), it was not long before they began addressing a series of pleas to the Commission to delete the VHF channel and protect them from this competitive threat. The first petition was filed on September 21, 1954. The Commission denied this request on November 4, 1954, stating:

> ". . . In reliance upon these assignments, two parties have prosecuted applications for Channel 8 at a considerable expenditure of time, effort and money . . . It is our view that it is only just and reasonable that the assignment of Channel 8 in Peoria should be changed only upon a clear and compelling showing that the public interest requires such a revision. We do

[7] 11 *R.R.* 533, 607-608, Joint Appendix 129-130.

not believe that petitioners have made such a showing." [8]

On December 3, 1954, the two stations filed a petition for reconsideration.

Again, on March 31, 1955, the Commission issued a series of deintermixture proceedings in five selected areas, Peoria being one.[9] Once again, on November 10, 1955, the Commission denied the proposal to remove Channel 8.[10] In pertinent part, this order reads as follows:

> "... whatever the merits of their contentions that local deintermixture would benefit the particular UHF operators and their local communities, the Commission has serious doubts that the requested relief would be meaningful with respect to the general problem ...
> "... In the Commission's opinion, considerations of both fairness and practicability preclude an ad hoc approach such as that suggested by the petitioners in these proceedings." [11]

Nevertheless, the Commission in the same order instituted a general rule making proceeding looking toward an effective nationwide solution to the problem of UHF generally.

It must be noted at this point that there was building up in Congress a terrific "pressure" on the Commission to "do something" for UHF television. Time after time Commission or industry representatives were called up to the "Hill" to testify and explain what the Commission was

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[8] Memorandum Opinion and Order, In re: Amendment of Table of Assignments. F.C.C. 54-1386, No. 12101, Nov. 4, 1954.

[9] The others were Evansville, Indiana, Madison, Wisconsin, Hartford, Connecticut and (later) Albany-Vail Mills, New York. Notice of Proposed Rule-Making, F.C.C. 55-406, No. 17475, March 31, 1955.

[10] 13 *R.R.* 1511.

[11] Id. 1516-17.

doing for UHF.[12] However, it was still the majority opinion of the Commission in early 1956 that selective deintermixture was not a solution. On February 7, 1956, in a colloquy between Commission Chairman McConnaughey and Senator A. S. Mike Monroney, from Oklahoma, Chairman McConnaughey was asked repeatedly whether authorizing new VHF stations would destroy the existing UHF stations; his answer follows:

> "Mr. McConnaughey . . . By putting in these V's some people will get service that wouldn't have gotten service before. There are some people who will be getting service from their local communities that wouldn't have been getting it before, and it involves basically putting in a V where it has been assigned, where there are 2 U's in operation, and we felt that 1 V with 2 U's —we had no evidence to show that means it is going to drive anybody out of business under that operation.
>
> "The Chairman. It might be well for the record to put in the names of these five areas.
>
> "Mr. McConnaughey. Hartford, Evansville, Madison, Peoria, and Albany." [13]

Finally, on June 26, 1956, the Commission issued a further allocation order terminating the nationwide allocation proceedings.[14] Again the Commission specifically reaffirmed

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[12] In 1956 alone, the Senate Committee on Interstate and Foreign Commerce held hearings on the UHF-VHF problems on nineteen different days. Television Inquiry, Committee on Interstate and Foreign Commerce, 84th Cong., 2d Sess., pursuant to S. Resolutions 13 and 163, Parts I and II.

[13] Id. Part I at 9-10. It is almost impossible to believe, but Chairman McConnaughey later cast the deciding vote in the initial decision which resulted in the deletion of Channel 8 from Peoria! One can only speculate as to why, but it is clear that his vote was completely inconsistent with his expressed opinion. It is also a matter of record that Mr. McConnaughey's law firm has represented one of the applicants for Channel 8 in the Tri-Cities area.

[14] Second Report on Deintermixture, released June 26, 1956, 13 *R.R.* 1571 (1956), J.A. 5-45.

its decision of November 10, 1955, that limited "deintermixture" in certain selected markets was no solution to general problems facing UHF broadcasting. The Commission said (13 R. R. at 1576).

> "It does not appear, however, that deintermixture at this stage would be practicable in a sufficient number of communities representing a sufficiently large segment of the total population to provide significantly enhanced opportunities for the fuller utilization of the UHF channels on a nationwide basis."

Thus, once again, and for the *third* time, the Commission refused to deintermix Peoria and other markets as a means of helping the UHF situation generally.

On this same day, however, in direct contradiction to the last quoted statement, the Commission proposed to institute separate allocation proceedings in thirteen separate communities, including the four previously mentioned,[15], as well as Peoria, and Springfield, Illinois. The Commission's proposal was based upon a totally new principle of "improving the opportunities for effective competition among a greater number of stations" in these thirteen markets.

On the same day and pursuant to this proposal, the Commission issued its "Notice of Proposed Rule Making" whereby Channel 8 would be removed from Peoria and given to the Tri-Cities and UHF Channel 25 substituted in its place. *Three days later*, the Commission delivered itself of the long-awaited comparative hearing decision in petitioner's case.[16]

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[15] *Supra*, note 9.

[16] This timing suggests that the inordinate delay in acting on petitioner's application was connected to, if not the results of, the pending allocation proceeding and perhaps to representations and influences outside the record, not the least of which is evident from the intense scrutiny to which the Commission was subject from certain members of the Senate and its Committee on Interstate and Foreign Commerce, *infra*.

This would have ended the matter. But instead, this award hopelessly entangled the petitioner. For instead of simply awarding a construction permit to build a Channel 8 station to the petitioner, the Commission illegally conditioned the same to the effect that the Commission could, without further proceedings, substitute for Channel 8 such other channel as might be assigned Peoria in the rule-making proceedings instituted three days before and conditioned further that petitioner should not commence construction until the conclusion of these proceedings.

Thus, after more than four years of effort and the expenditure of over $50,000 and incurring commitments, some tentative and some firm, of around $300,000 (R. 545), petitioner was granted a construction permit which did not permit construction and which granted the right to use Channel 8 but which also stated that it might be changed to some UHF channel, a channel never applied for and specifically avoided from the beginning.

Petitioner filed petitions for reconsideration of (a) the conditions attached to the permit, alleging they were illegal and unwarranted, (b) the institution of the proposed rule making, and (c) for a full evidentiary hearing as to whether Channel 8 should be removed. All these were later denied.

The Commission proceeded with its informal rule making. In addition to the protests of the petitioner, vigorous opposition was voiced by approximately 40 towns, including the City of Peoria, farm bureaus and labor groups in the Peoria Trading Area. In addition, the State of Illinois, through its Attorney General, filed its objections to the deletion of Channel 8 from this area.[17]

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[17] In these objections it was pointed out that the proposed move would increase the already disproportionate number of VHF channels in Iowa as compared with Illinois; that a VHF channel was essential in order to reach and cover the Peoria Trading Area; that about 500,000 Central Illinois residents would lose first class television service if Channel 8 were deleted and that the present allocations were "fair, efficient and equitable." *J.A.* 106-107.

Despite this, the Commission on March 1, 1957 deleted Channel 8 from Peoria and assigned it to the Tri-Cities. Its rationale was that such action met its "interim" objective of "improving the opportunity for more effective competition among a greater number of stations" in Peoria.[18]

The Commission thereupon applied its next and finishing touch to these proceedings and released its order of May 17, 1957 in which Petitioner's permit for Channel 8 was modified "without any further proceedings" to specify Channel 25 in its stead.[19]

Petitions for review were filed in the Circuit Court of Appeals for the District of Columbia. Petitioner argued that the action of the Commission was arbitrary and capricious and was contrary to section 307 (b) of the Communications Act. Petitioner further questioned whether the Commission could delete Channel 8 for the stated purpose of "improving the opportunities for effective competition" among the favored UHF licensees. Finally, Petitioner maintained that it was entitled to an evidentiary hearing on the question of conditioning its permit or substituting a UHF for the VHF channel under the Communications Act, Administrative Procedure Act and the United States Constitution.

In its decision, the Court of Appeals affirmed the Commission, dismissing the charge of arbitrariness as not well

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[18] *J.A.* 109-126. Th Commission acted similarly with respect to Springfield, Illinois, a city in the same geographical area as Peoria. There the only VHF Channel (2) was removed and given to St. Louis, Missouri which already had 4 VHF channels. The Commission's reasons for so doing were substantially the same.

[19] 22 F.C.C. 1039, 11 R.R. 609, *J.A.* 131-137. The Commission even conditioned the grant of Channel 25 to a surrender by the petitioner if all asserted rights with respect to Channel 8! Petitioner's rival in the comparative hearing, respondent WMBD, Inc., subsequently accepted a permit for UHF Channel 31, relinquishing all claim to Channel 8 and stating it was willing to compete with that channel.

taken, approving the deletion of Channel 8 as simply a matter of administrative discretion and holding that the Commission had "acknowledged authority" to impose the conditions in petitioner's VHF grant.[20]

The Court does not discuss or even mention section 307(b) but sanctioned and approved the doctrine of economic protection contrary, petitioner asserts, to the decisions of this Court.

REASONS FOR ALLOWANCE OF THE WRIT

I

The Circuit Court of Appeals in affirming the action of the Commission has sanctioned such a clear departure from the express terms of section 307(b) of the Communications Act as to call for an exercise of this Court's power of supervision.

Specifically, the petitioner charges the Commission's action was illegal and unwarranted in the following respects:

(a) The Commission has abandoned the accepted principles of allocation set forth in section 307 (b) and established by the Sixth Report, and embraced a novel and illegal doctrine of "equalizing competition" nowhere found in the Communications Act.

(b) The Commission's action in deleting the only superior television facility in the second largest city in Illinois and reassigning it to a border area smaller in size and population which already had 2 VHF channels, giving Iowa 12 VHF channels and Illinois but 10 violates the mandatory requirement of fair, efficient, and equitable distribution of broadcasting service to each of the several States and communities.

(c) The Commission's action was taken despite the vigorous written objections of the Station of Illinois, the City of Peoria, and 40 other towns and Commu-

[20] 253 F. 2d 863 (1958). Petitioner's Exhibit "A" hereto.

nities, labor and farm groups and was taken solely to improve the competitive positions of UHF operators in Peoria and was consequently a clear case of subordinating public interests to private interests in violation of the spirit and intent of the Communications Act and the decisions of this Court.

(d) The action of the Commission is contrary to the principles announced by this Court in *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*,[21] and *F.C.C.* v. *Allentown Broadcasting Corp.*,[22] requiring a finding as to the relative needs of the communities involved for the radio service in question.

(e) The failure of the Circuit Court of Appeals in the instant case to even discuss the 307(b) issue and its willingness as demonstrated in this and other recent decisions to give judicial approval to the doctrine of "equalizing competition" and to consider "economic impact" on existing stations in licensing matters, conflicts not only directly with the principles of the *Nelson Brothers* and *Allentown* decisions, *supra*, but also with this Court's opinion in *F.C.C.* v. *Sanders Brothers Radio Station*.[23]

Section 307 (b) provides as follows:

> "In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." [24]

In connection with the above language it is important to recall that the Commission itself recognizes the compara-

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[21] 289 U.S. 266 (1933).

[22] 349 U.S. 358 (1955).

[23] 309 U.S. 470 (1940).

[24] Petitioner's Appendix "B".

tive technical superiority of VHF as opposed to UHF.[25] Considering this basic engineering fact, the question is squarely raised whether the Commission's action in deleting the superior service for competitive equalization reasons complies with 307 (b).

Traditionally, that section has been construed to include a consideration of the number of technical services available to the public and the efficiency or quality of the service available. All things being equal, a community or state will be favored if it had a lesser number of services, or services of lesser efficiency, taking into account the size and importance of the community. These same concepts were applied in adopting the Sixth Report. It established a fair distribution of VHF and UHF facilities across the country in accordance with the size, importance and needs of the communities involved. The more superior facilities of VHF were allocated to large metropolitan areas and areas of common interest and trade. Under these principles, Channel 8 was allocated to Peoria in recognition of its size and importance and broad trading area.

The principles of 307 (b) therefore demand that the various States and communities should each be entitled to their share of the superior channels as well as inferior channels, in accordance with the community's size and importance.

To allocate television channels contrary to these principles is to do violence to 307 (b). Yet this is precisely what the Commission has done. It has not only abandoned the concept of fair, efficient and equitable distribution of channels in favor of a concept of promoting limited local competition, but it has almost completely ignored it.[26] This

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[25] Paragraph 10 of Second Report on Deintermixture, *supra*, note 14.

[26] Section 307(b) was not even mentioned in the Second Report on Deintermixture which instigated the deletion of Channel 8 and the Commission pays only lip service to it in the Order of March 1, 1957 (*J.A.* 124).

complete disregard of 307 (b) prompted the present Chairman to dissent. He stated in part:

> "The Federal Communications Act provides that the distribution of frequencies among the several states and communities shall be upon a fair, efficient and equitable basis. It makes no provision for a 'nationwide competitive system.' Admittedly ample competition, if attainable without doing violence to the equitable and efficient provisions of the Act, would be in the public interest. But when this is to be accomplished at the expense of denying a first television service to substantial numbers of people, it is tantamount to displacing the Congressional mandate of an efficient and equitable distirbution and substituting therefor equal competitive facilities for a few applicants.
> To assign only UHF frequencies to some communities when a VHF service is available is, in my opinion, inequitable. A VHF service presently is superior to a UHF. In comparison with UHF, a VHF signal has a wider coverage and less shadow area. Both in operation and in reception, VHF is less costly. To ignore these differences in the present stage of the development of broadcasting is to disregard the specialized knowledge of this Commission and the experience of the industry and the public." [27]

The Commission seeks to allay fears that it is giving economic protection to UHF licensees by its action in the Peoria case. In its Order of March 1, 1957, it states:

> "It should be emphasized that in deleting Channel 8 from Peoria, our primary purpose is not to insure the profitable operation of particular UHF licensees. Rather, we wish to insure more effective competition among a greater number of stations in order that the public in Peoria will be afforded more and better television service." [28]

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[27] Second Report on Deintermixture, dissenting statement of Commissioner Doerfer, *J.A.* 41-42.

[28] *J.A.* 124.

We believe it obvious to this Court that no matter what label is attached to it, the inexorable fact remains that the Commission is depriving Peoria of a superior service because (it claims, and petitioner denies) the existing licensees *might* not be able to compete.

This is the *crux* of this case. Can the Commission violate the principle of 307 (b) by giving its action another name, or by saying that it is doing this to "encourage the larger and more effective use of radio" as authorized by section 303 (g)?[29] It is submitted that it cannot. The provision for the encouragement of new and experimental uses of radio of that section cannot contravene the plain mandate of section 307 (b).[30]

Nor is the *Coastal Bend* case,[31] which is much relied upon by respondents, authority to the contrary. That case did not involve a question as to the legality of any deletion order. Section 307 (b) accordingly was not even in issue. That case merely held that the Commission's decision to abide by the allocations of the Sixth Report was proper.

The Commission does not and cannot claim that the deletion was made because there is no need in Peoria for Channel 8 nor that it is not an important enough market. Peoria is the 74th major market in the country, the second largest city in Illinois and the heart of a prosperous and extensive agricultural area. Illinois is the fourth largest state in population, Iowa the 22nd. Yet if the Peoria allocation is given to the Tri-Cities, Illinois will have only 10 VHF allo-

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[29] Petitioner's Appendix "B".

[30] While "the Commission may allocate channels among communities either by passing upon specific applications or by way of rule making," Logansport Broadcasting Corp. v. United States, 210 F. 2nd 24, 27 (1954), the mandate of section 307(b) must be observed whichever procedure is involved.

[31] Coastal Bend Television Company v. F.C.C., 234 F. 2d 686 (1956).

cations, with a substantial amount of Channel 8 service benefiting Iowa which already has 12.

The deletion is being made not because there is any greater need in the smaller State or in the smaller community for this channel, for Peoria is a more important and larger market and has need of the broad coverage offered by VHF; not because there are fewer superior services in this smaller community, for indeed, there now will be three superior VHF services in this smaller area, as opposed to none in the Peoria area; not because the service can be used in any more efficient or effective manner technically in the smaller community; not because any greater number of people will be served by changing the allocation, for in fact a greater "white area"[32] will be served by a Peoria station (Record 500). Nor can it be said that the public is desirous of the change; over 40 separate communities, including the City of Peoria, have passed resolutions protesting the removal of Channel 8 from the Peoria area; the State of Illinois, certain trade groups and others have also expressed their strenuous disapproval of the move (R. 615, 990, 996). Therefore, the normal 307 (b) concepts of need, demand, effiicency, and fair distribution give way to a new principle, namely, since the two UHF stations will not theoretically be able to compete against a VHF competitor, an inferior UHF channel must be substituted. Such a clear case of subordinating public interest to private interest is foreign to the Communications Act.

Nowhere in the Communications Act can be found any authority for considering question of economic impact on other licensees in passing upon grants or allocations. If Congress had wanted the Commission to consider economic factors it would have so provided in the Act creating it. It could have provided that all stations should be competitively equal as the Commission is seeking to do, but it did not. The principle that the field of broadcasting is one of

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[32] Commonly used to designate that area which receives no dependable television signal.

free competition has been clearly enunciated by this Court in the *Sanders* case.[33] The Court there said at p. 475:

> "Plainly it is not the purpose of the Act to protect a licensee against competition but to protect the public. Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public."

It is submitted the action of the Commission in the instant case is such a direct contradiction to the principle stated in the *Sanders* case as to in and of itself require the corrective supervision of this Court.

In the *Nelson Brothers* case,[34] this Court had occasion to inquire into the propriety of the Commission's action in assigning a radio frequency to an applicant in Indiana, a State found to have less than its share of broadcasting facilities and terminating the license of a station on the same frequency in Illinois, which State was found to have more than its share of such facilities.

This Court upheld the Commission's actions, holding that the concern of Congress was with the interest of the people —that they might have a reasonable equality of opportunity in radio transmission and reception and that this involved an equitable distribution not only as between zones but as between States as well.[35]

Here, however, despite the obvious disparity between Peoria and the Tri-Cities and between Illinois and Iowa as far as size, importance, population, and need are concerned, the Commission deleted the channel from an under-quota

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[33] *Supra,* note 23.

[34] *Supra,* note 21.

[35] Under the Radio Act (45 Stat. 373) as it then existed, the United States was divided into five zones for allocation purposes and sec. 9 thereof called for fair and equitable allocation of licenses within each zone.

state and community and assigned it to an over-quota state and community solely on the basis of competitive equality.

In the *Allentown* case,[36] this Court again had occasion to examine the mandate of 307 (b). That case involved the award of a radio broadcast license to one of two mutually exclusive applicants therefor, each of whom sought to serve a different community. This Court upheld the Commission's decision that it must *first* determine which community has the greater *need* for the service and *then* determine which applicant can best serve their community's needs.

No such determination or finding as to *need* was made here. Indeed, no finding that the Tri-Cities and Iowa had greater *need* for the channel than Peoria and Illinois could have been supported by the evidence.

The failure of the Circuit Court of Appeals to insist that the Commission follow the mandate of 307 (b) in this case, the *Springfield, Illinois* [37] decision and in the recent *Carroll Broadcasting* case [38] demonstrates forcibly the need for this Court's supervision in this area. In the *Carroll* case the Court went further than possibly even the Commission desired in ruling that the Commission, in passing upon license applications, has the power and duty to consider the effect of economic injury to an existing station if the grant would also be "detrimental" to the public. The Court made it plain that the Commission is expected to reverse its long standing policy of ignoring economic impacts of its grants on existing broadcasters and consider their effects on public service if contestants in the area raise the issue.

Here indeed the Court is introducing a new and far reaching doctrine into the regulatory activities of the Commission.

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[36] *Supra*, note 22.

[37] Sangamon Valley Television Corp. v. United States of America, 255 F. 2d 191 (1958).

[38] Carroll Broadcasting Co. v. F.C.C. United States Court of Appeals for the District of Columbia Circuit (not yet reported) Decided July 10th, 1958.

What sort of proof will be required in future cases if evidence of economic impact or equalizing competition are to be considered? Certainly the Commission would have to adopt all sorts of new standards and regulatory tools characteristic of public utility commissions if this ruling is allowed to stand. For inevitably such proof would involve factors of local operation, local economics, efficiency and economy of operations and management, all of which the Commission is not equipped to ascertain.

It is submitted that the Commission is not a regulatory body in the nature of a public utility commission but rather in the nature of a "traffic policeman" delegated by Congress to make certain that stations do not electronically interfere with one another. If the Circuit Court of Appeals is allowed to pursue its present th nking in this area, then the doctrine of free enterprise n the field of broadcasting established by the *Sanders* case is gone forever.

II

The action of the Commission deleting Channel 8 from Peoria, over the protests of the petitioner, who had prosecuted a long, comparative hearing in reliance upon the assignment of said channel and over the protests of a substantial portion of the public, was so arbitrary, capricious and discriminatory as to call for the exercise of this Court's power of supervision.

Petitioner does not contend that the Commission does not possess the power to change channel allocations for admittedly, it does. Petitioner does maintain however that if such changes are to be made, they must be made first, in accordance with the mandate of 307 (b) and, second, uniformly and fairly throughout the nation. The Commission's action here is fatally defective in both respects.

Let us see what the Commission has actually done with its brave new policy of equalizing competition. Out of the thirteen communities delected for deintermixture in the

Second Report on Deintermixture[39] *only in Peoria and Springfield have the VHF allocations actually been deleted despite substantial reliance by applicants upon these allocations.*

In four of the original thirteen communities, the Commission *added* VHF channels to existing allocations, so obviously no complaint could be made there. In the remaining nine cases, the Commission proposed to delete the superior VHF facility. The following results have obtained:

In New Orleans, La.[40] and Albany-Vail Mills, N. Y.[41] a VHF channel was added.

In Elmira, N. Y.[42] the Commission deleted a VHF *where no one had applied for the license.*

In Hartford, Conn.[43] and Madison, Wisc.[44] the Commis-

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[39] *Supra,* note 14.

[40] 15 *R.R.* 1603.

[41] Decision released August 2, 1947, Report No. 14, Public Notice—B, No. 48523.

[42] 15 *R.R.* 1515.

[43] 15 *R.R.* 1540 i, affirmed by the Circuit Court of Appeals on June 19, 1958 in cases No. 14050, 14051, Springfield Television Broadcasting Corp. et al. v. F. C. C. (not reported). The Court's comment in denying the Hartford UHF operators plea to delete the VHF channel is interesting. The court remarked that the VHF channel was assigned to Hartford at the same time UHF channels were allocated there. The court then said: "They (the UHF operators) took their licenses with full knowledge of the situation; they are trying to change an allocation which has existed as long as has theirs. So their argument in respect to the effect of this long-delayed grant on existing operations is unimpressive. The only difference between them is that their grants were made quickly and this one was contested by other applicants." Exactly the same situation prevailed in Peoria, but in the Peoria case the similar arguments of the UHF operators were somehow "impressive."

sion decided against deleting the VHF allocations, leaving the situation unchanged with both VHF and UHF continuing to compete in the same markets.

In Evansville, Ind.[45] and Fresno, Calif.,[46] where VHF stations were on the air, the Commission ordered "show cause" proceedings initiated to determine if the deletion of VHF channels would be in the public interest as required by Section 316 of the Communications Act. Although this order was entered more than one year ago, these hearings have yet to be held.

Finally, only in Springfield and Peoria, one geographical area, were the channels deleted despite the protest of applicants who had completed long comparative hearings in reliance upon the VHF assignments.

It is obvious that of the communities selected for deletion of VHF, the only ones who have thus far suffered from this "interim" treatment have been those who, through no fault of their own, have had their applications delayed beyond all reason.

On November 10, 1955 in the Order denying deintermixture in Peoria,[47] the Commission said:

> "... if deintermixture, even on a partial basis, should finally be determined to be a useful method of resolving the overall problems, *the particular communities for its application should not be selected merely because of the fortuitous circumstance of whether a VHF*

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[44] 15 *R.R.* 1563, affirmed by the Circuit Court of Appeals by decision dated July 2, 1958, in case No. 14086, Winnebago Television Corp. v. United States of America (not reported).

[45] 15 *R.R.* 1573.

[46] 15 *R.R.* 1586e.

[47] 13 *R.R.* 1511, 1516-17.

station has commenced operation in any particular community . . ." (Italics added).

Yet it is submitted, that is exactly what has happened. This was admitted by the present chairman of the Commission in his dissent to the Second Report on Deintermixture [48] where he said:

> "Although the avowed purpose of deintermixing is to provide a better competitive situation in these markets in the interim, actually this action is confined merely to those pending VHF applications which incurred delays in processing. This is a fortuitous circumstance and not a substantive solution to the problem."

The Commission by its action, has repudiated 307 (b) and has abandoned the well established principles of the Sixth Report in favor of the doctrine of equalizing competition. But it has adopted this new principle by final action, in only one geographical area in the country. It is submitted that under these circumstances the Commission should be required to show by substantial evidence that the *public interest* requires the rule change in Peoria and that any change must be applied fairly and uniformly.

The Commission has failed to meet this test. There has been no showing of a need for a change, a need which will justify upsetting the long reliance upon this allocation. This is obvious from the fact that only *one area in the country* has actually had the VHF channel finally deleted where there was this reliance. This is obvious from the fact that on three prior occasions the Commission expressly *refused* to *delete* Channel 8 from Peoria. This is obvious from the fact that in other intermixed markets the Commission has expressly refused to delete the VHF channels.

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[48] *Supra*, note 27.

For example, the Commission, on March 25, 1958 refused to even institute rule making, looking toward the deletion of the only VHF channel from Champaign, Ill., a community some 80 miles from Peoria and Springfield. That entire area was a so-called UHF area in that there were a number of UHF stations operating and UHF allocations available which could be utilized if no VHF service were competing. The UHF operators urged that the "opportunities for more effective competition" would be served by deleting the VHF assignment in Champaign. The Commission completely rejected all such arguments.

Thus, here is the same general market area, the same general facts, the same arguments and the same request that the new principle be applied also to Champaign. Yet the Commission does not even discuss the principle, nor the decisions in the *Peoria* and *Springfield* (Illinois) cases.[49] Petitioner feels this demonstrates the completely arbitrary and discrim natory fashion in which the Commission has applied its new principle.

Thus, there are presented questions that neither the Court below nor the Commission have ever answered. Why are Peoria and Springfield the *only victims* of this *new principle of allocation?* What sort of new *compelling principle* is it that only has applicability to one relatively minor geographical area in the country? What significant benefits can stem from this puny effort?[50] (Other perhaps than to

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[49] This is not an isolated example. At the time of the order deleting Channel 8 (March 1, 1957) at least ten petitions were pending wherein a proposal was made to delete a VHF channel from a community receiving UHF service. *To date, not a single one of these petitions have been granted and many have been denied.* See Raleigh, N.C. 15 *R.R.* 1653; Jacksonville, Fla. 15 *R.R.* 1732; Spartanburg, S.C. 15 *R.R.* 1650; Charlotte, N.C. 15 *R.R.* 1659; and Fort Smith, Ark. 15 *R.R.* 1678, all denied.

[50] The Commission utters soothing statements to the effect that they have not finished with the deletion of VHF channels and that

benefit the UHF stations in Peoria and Springfield). Why, if the Sixth Report principles have failed—and the Commission tells us they have—does not this new principle have broader and more uniform applicability?

These unanswered questions are fundamental. In every market in America at the moment, *except Central Illinois,* the principles of the Sixth Report and Order still apply. Can the Commission seize upon this new principle of equalizing competition so as to destroy VHF in Peoria and Springfield, yet not bother to apply or sometimes even to discuss it in all the other markets where it would supposedly be helpful to solve the UHF problem? The answer must be in the negative.

Equally important in this connection is the fact that the order of March 1, 1957 deleting Channel 8 is not supported by competent evidence. The bulk of the evidence relied upon is not found in this record, but instead is found in other docket proceedings of which presumably (we are led to believe) the Commission took official notice. However, even if it is assumed that reliance was made on such evidence, the use of such material is completely improper and prejudicial to petitioner. Petitioner was given no opportunity to know the evidence against it, nor to defend effectively against it. Obviously, petitioner was not a party to these other proceedings.

The Commission also assumed certain facts in arriving at its conclusions that were not realistic or justified. For example, in computing the effective ranges of UHF stations in Peoria for purposes of comparing the same with the effective range of a VHF station, the Commission bases its

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while Peoria-Springfield may appear to be the only victims, there may be others. However, the fact remains, that, although there are 274 markets with both UHF and VHF allocations intermixed in the same community, to date no other VHF channel has actually been deleted where there has been a reliance upon the original allocation.

calculations upon proposed tower heights for the UHF stations that were not inexistence then and are not now. [51]

The Commission likewise ignores the fact that Peoria possesses considerable hilly terrain (being situated on the bluffs overlooking the Illinois River) which prevents UHF reception in those areas, but recognizes those facts in both *Madison* and *Hartford* cases.

Petitioner earnestly believes that the record in this case discloses that the action of the Commission is arbitrary, discriminatory, and capricious and not based upon substantial competent evidence.

III

The denial by the Commission of petitioner's request for a full evidentiary hearing on the question of the deletion of Channel 8 was in such complete violation of the Fifth Amendment of the United Constitution, the Communications Act, and the Administrative Procedure Act as to call for corrective supervision of this Court.

The order of March 1, 1957 deleting Channel 8 and the order of May 17, 1957 modifying petitioner's construction permit to specify operation on Channel 25 instead of 8 were both decided after holding informal proceedings in which interested parties were permitted to file unsworn, self-serving written comments. The only opportunity to controvert the matters alleged was the privilege of filing "Reply Comments." Moreover, there was no direct or cross examination and no oral submission whatever. It is submitted that the procedure followed violates petitioner's right to a full and fair evidentiary hearing in which the

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[51] Calculations were based upon a UHF tower height of 1000 feet (J.A. 116), which the UHF stations were suppose to increase to shortly. Actually, permission for such height was denied by the Civil Aeronautics Authority and both stations are presently operating with a tower of less than 700 feet.

burden of showing the need for the deletion of the channel rested upon the Commission.

This is so for two reasons. First, the petitioner's status should be equated to that of an unconditional permittee because of the particular facts of this case and because of the actions taken by the Commission creating rights of a permittee in petitioner with in the meaning of sections 303 (f) and 316 (a) of the Communications Act. Second, the "conditioning" of petitioner's permit is "licensing" within the meaning of the Communications Act and the Administrative Procedure Act and as such, requires a full adjudicatory hearing. (The pertinent provisions of these Acts are all set forth in Petitioners Appendix "B" hereto).

Section 316 (a) of the Communications Act provides that a construction permit may be *modified* by the Commission only after notice to show cause by public hearing why the modification order should not issue and 316 (b) places the burdens of going forward and proof upon the Commission.

In the instant case, the petitioner was denied this very valuable procedural advantage because the Commission had "conditioned" its permit that Channel 8 could be removed "without further proceedings". The issue is squarely raised whether under the facts of this case, the Commission could lawfully deprive petitioner of this right.

Channel 8 had been allocated to Peoria for five years. During the last four years, petitioner had prosecuted its application for it. During this period, petitioner and its rival applicant were the only parties that had any claim on that channel. When petitioner received its permit on June 29, 1956 it became the only "legal person" in the world that had any direct specific interest in that channel. This right, it is submitted, is entitled to protection under

section 316 of the Communications Act regardless of any attempt by the Commission to whittle it down by conditions.

More important however, is the manner in which the Commission had prevented petitioner from becoming an unconditional permittee and from being in actual operation. On June 29, 1956, this case had been awaiting final decision after oral argument for *fourteen months*, and *eighteen months* had elapsed since the initial decision. This was unquestionably a deliberate withholding of action. That this is so, is evident from the manner in which the four other stations involved in the deintermixture proceedings which ended in November 1955 were treated. In these four communities, Peoria, Evansville, Hartford and Madison, UHF operators asked the Commission to stay action on these four pending VHF applications until the allocation procedings had been concluded. The Commission denied the request stating it "would not be justified in withholding action" and denying service to the public. [52]

Accordingly the Commission issued final grants to Evansville, Madison, and also Fresno. But despite its older docket number and despite the fact that it had been waiting for final decision for six months, no final decision was given Peoria. Finally, 8 months later, but *three days after* deletion proceedings had been started to remove Channel 8, the Commission came out with the final grant to petitioner, but attached the conditions heretofore described—conditions which it now says justifies its refusal to afford petitioner the procedural rights granted by section 316 and which rights are now proving most valuable in Evansville and Fresno. As previously remarked, allocation proceedings have been commenced there, but these two stations are on the air and the burden of proof after a full hearing is in the Commission. It is submitted that this withholding of action so as to deny petitioner substantial procedural rights

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[52] 13 *R.R.* 1511, 1517-18.

is unlawful and arbitrary, particularly where in related proceedings the Commission promptly awarded final grants without attaching conditions and upon the express finding that prompt decisions in the cases would serve the public interest.

The second reason petitioner's rights were violated by the Commission's refusal to grant it a full hearing can be seen upon a reference to pertinent provision of the Communications Act and the Administrative Procedure Act. Section 303 (f) of the Communications Act provides in part that no change in frequency, power, or times of operation of a station shall be made without consent, except after a full hearing.

Section 309 (b) provides in part that applicants for a license are entitled to a full hearing.

Section 316 provides that no license or construction permit shall be modified except upon a show cause order and after hearing with the added protection that the burden of proof is in the Commission.

It is thus evident that the drafters of that act were anxious to see that rights arising out of the application for a license or any change or modification of a license or permit be guarded by the privilege of a full hearing.

But the Commission says the petitioner is not a permittee, and that consequently it can attach conditions to his permit, in advance, after following only rule making procedure. Petitioner asserts the Commission is in error because, first, such action violates the intent and specifications of the Communications Act as shown in the above referred to sections; and second, such procedure is forbidden by the Admistrative Procedure Act and reference to the provisions of this Act will make this clear.

Section 2 (d) defines "Order" as "the whole or any part of the final disposition . . . of any agency in any matter

other than rule making but including licensing." It defines "adjucation" as "agency process for the formulation of an order."

Section 2 (e) defines "license" as "the whole or any part of any agency permit . . ." It defines "Licensing" as including "agency process respecting the grant . . . or conditioning of a license."

It can readly be seen therefore that:

1. The construction permit awarded petitioner was a "license". (2 (e))
2. "Licensing" includes "conditioning" a license. (2 (e))
3. "Licensing" must be done by "Order." (2 (d))
4. Agency process for the formulation of an "order" is termed "adjudication".
5. "Adjudication" is distinguishable from rule making (2 (c))

Section 5 provides the nature of the proceeding that must be utilized in cases of adjudication. This includes submission of facts, argument and decision in accordance with sections 7 and 8. These sections set forth in detail such procedure and includes the right in every party to present his case by oral or documentary evidence, to submit evidence, and also the right of cross examination, none of which were afforded petitioner in this case. It is therefore obvious from the above provision of the Administrative Procedure Act that the action of the Commission attaching conditions to petitioners construction permit could legally be done only after a full evidentiary hearing.

As indicated, the Commission refused to grant petitioner a full evidentiary hearing and this refusal was affirmed by the Circuit Court of Appeals. The Court below summarily dismissed this argument by labeling the procedure followed

by the Commission as rule-making without inquiring into the real nature of the proceeding.

Petitioner earnestly submits that this "short circuiting" by the Commission of valuable procedural rights violates the due process provision of the Fifth Amendment of the Constitution and is in direct violation to the Communications Act and Procedure Act above.

When it was imminent that there would be an initial decision on Channel 8 for the Peoria area, United States Senator Robert S. Kerr, as a majority stockholder of Respondent West Central, and in its behalf, filed a petition in September, 1954 with the Commission, asking that Channel 8 be removed from Peoria in order that his station would not have to compete with it, claiming his station could not compete with a VHF channel. His station, WEEK-TV, has filed various other petitions and although the Commission on three occasions refused to take Channel 8 out of Peoria because they found it was in the public interest that the same should remain their, Senator Kerr's station continued its barrage of activity and pressure for removal of Channel 8, up to and including the present time; and, as an active intervenor in this case.

Senator Kerr, worked in cooperation with his colleague, Senator A. S. Mike Monroney of the Senate Interstate and Foreign Commerce Committee. The Commission's supervisory committee, held many hearings about the VHF-UHF problems and particularly as it concerned Peoria, Ill. Great pressure was exerted by the Committee on the commission under the threat that the Committee would bring in its own report if the Commission did not do something for UHF. (Oddly enough, the hearings for deintermixture came to an abrupt end as soon as Senator Kerr's station was granted competitive immunity from a VHF (Channel 8) station in Peoria).

Senator Kerr's petitions before the Commission were so effective that the final adjudicatory decision on the WIRL-

TV comparative hearing case was held up for approximately 18 months. When the decision did finally come out on June 29, 1956, it contained an illegal provision which the Commission's own Broadcast Bureau said was improper and unwarranted, granting Channel 8 but directing that the construction of the same be held up until it could be decided whether or not Channel 8 was going to remain in Peoria. This apparently was because, by some strange coincidence, a fourth attempt had been started to delete the channel only three days previously which later proved successful. The initial vote was 4 to 3, with one of the commissioners thereafter abstaining, making the vote 4 to 2. Chairman McConnaughey after the interrogation by Senator Monroney about Peoria, [53] had changed his mind apparently and voted for the removal of the channel, although on three occasions before he had always insisted that the channel should remain in Peoria.

Senator Robert S. Kerr, principal owner of WEEK-TV, Peoria, Illinois is a Senator of the United States of America. As such, he is a public officer of the United States Government which has granted UHF Channel 43 to the company in which he is major stockholder, and which Government granted Channel 8 to WIRL Television Company. Senator Kerr, even though a Senator, is subject to the same public laws that other public officers are. He cannot, because of his position as a Senator, lawfully have his UHF television franchise protected from competition with Channel 8, an admitted superior television facility, over the objection of the State of Illinois and of the City of Peoria and more than 40 towns and several agricultural, business and labor groups. and any attempt by the Commission to give him such protection violates the basic principles of public policy and contravenes the public interest.

Senator Kerr, as a public officer should not have his private interest conflict with the public interest of having

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[53] *Supra*, note 13.

first class television, an issue which is present in this case. For, as stated in Volume 43 American Jurisprudence, Section 260, page 77:

> "The obligation of public officers as trustees for the public are established as a part of the common law, fixed by the habits and customs of the people. Among their obligations as recipients of a public trust are to perform the duties of their offices honestly, faithfully, and to the best of their ability; to obey the United States and State Constitutions and to obey the laws enacted thereunder."

It is further stated in 67 C.J.S., Section 116:

> "A public office is a public trust and the holder thereof may not use it directly or indirectly for a personal profit; and officers are not permitted to place themselves in a position in which personal interest may come into conflict with the duty which they owe to the public; . . ."

Petitioner charges Senator Kerr has used his influence as a United States Senator for his own private gain in "carrying the ball" for deintermixture in Peoria through his UHF station. He initiated the first deintermixture petition and, with his guidance, has been instrumental in carrying it through to a successful conclusion. His membership, of which this Court will take judicial notice, on the Senate Finance Committee which has much to say about the appropriations for the Commission is not to be underestimated. No United States Senator's power and influence is to be underestimated, particularly when dealing with United States Government agencies. Nor should Senator Kerr's, since he has been able to have the Peoria area market deintermixed, the only market in the United States that has been deintermixed where the parties have gone through long, comparative hearings. This has been accomplished despite the fact that there are presently 274 markets in the United States with both UHF and VHF allocations intermixed, and over 1250 allocations made and still in effect by

the Sixth Report. U. S. Senators influence with executive branch of governmental agencies is elementary and tremendous and accepted for, as stated in the case of *Burton* v. *U. S.*, 202 U.S. 344, at page 368:

> "Congress, when passing this statute, knew, as, indeed, everybody may know, that executive officers are apt, and not unnaturally, to attach great, sometimes, perhaps, undue, weight to the wishes of Senators and Representatives. Evidently the statute has for its main object to secure the integrity of executive action against undue influence upon the part of members of that branch of the government, whose favor may have much to do with the appointment to, or retention in, public position of those whose official action it is sought to control or direct. The evils attending such a situation are apparent and are increased when those seeking to influence executive officers are spurred to action by hopes of pecuniary reward. There can be no reason why the government may not, by legislation, protect each department against such evils, indeed, against everything from whatever source it proceeds, that tends or may tend to corruption or inefficiency in the management of public affairs. A Senator cannot claim immunity from legislation directed to that end, simply because he is a member of a body which does not owe its existence to Congress."

The Commission is no exception to Senatorial and other pressures as revealed by the present legislative oversight committee hearings of the House Committee on Interstate and Foreign Commerce now going on, but which Senator Kerr is immune from being called to testify before since Congressional courtesy grants him immunity in spite of the demands of some of the Nation's Press. Those hearings have brought out that only in this area in Central Illinois have the cities of Peoria and Springfield had their VHF channels taken away from them. [54]

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[54] See, Transcript of the Hearings of the Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce, May 26, 1958 (Not yet officially printed).

Senator Kerr's personal interest in having his Government franchise or contract protected as it is being done by the Commission by deleting Channel 8 in this case, is contrary to the spirit of the Common Law and laws of the United States regarding public officers and conflicting interests, and members of Congress and their interests. The Order of the Commission taking out Channel 8 in order to equalize competition is against the public policy of public officers having franchises which the government economically protects.

The integrity of governmental action is involved here which violates the doctrine of separation of powers of this government, since the acts of the legislative branch (Senator Kerr and his colleagues) have prevailed over the acts of the executive (Commission) in this case, to the detriment of more than one-half million people who, by such order deleting Channel 8, are being deprived of their only first-class VHF television service.

The subcommittee on legislative oversight of the committee on Interstate and Foreign Commerce of the House of Representatives has been doing some investigation on the fact that a small part of Central Illinois is the only place in the entire United States where the Commission has ignored and violated its statutory mandate of 307 (b). On May 26, 1958, an attorney for the subcommittee, Mr. Angland and congressman Peter F. Mack of Illinois, a member of the subcommittee, testified as follows:

> Mr. Mack: "The very purpose of our investigation is to see if laws have been repealed by the independent agencies, to see whether they are abiding by the law as passed by Congress, or whether they are establishing their own rules notwithstanding the laws passed by Congress.
>
> "You remember that in the Federal Communications law that the Congress expressed a desire to have equitable consideration in all areas and that it was the intent of Congress not to discriminate against any state, any

individual, any municipality, or any group of individuals, is that correct?''

Mr. Angland: ''Yes, sir.''

Mr. Mack: ''As a matter of fact, are they not discriminating against the people in this particular area where they have deintermixed? Are they not discrimiating against these people by giving them inferior service in this area?''

Mr. Angland: ''I think so. This is the capital (Springfield) of one of our large states. It is an important city.''

Mr. Mack: ''I inquired about this matter the other day. I think it is alarming and as yet it has only affected one state and one area within that state.

''The deintermixture question is the important one as far as I am concerned, because I believe that that is probably the first instance where we have run across a gross violation of the basic law (Communications Act) by the Federal Communications Commission.'' [55]

Congressman Mack at these hearings made the statement that the deintermixture of a part of Central Illinois was a result of certain Senatorial pressures. The Springfield VHF deletion order entered at the same time approximately of the Peoria VHF deletion was scenery for Senator Kerr's deletion of Channel 8 in Peoria.

These committee hearings have also brought out that it is common practice for Senators and Congressmen to discuss pending cases with the Commission before decisions are made; that there is no code of ethics followed in this connection; that with the great value of television channels, several cases have been decided on matters outside of the record; that the confidence of the public has been shaken in the administration and functioning of the commission. That legislation has been introduced to abolish the Commission; that there is a great and compelling need for leg-

[55] Id. pp. 623-625.

islation to protect the Commission from outside pressures including that of Senators and Congressmen. It is in this climate and atmosphere that the Channel 8 deletion order was entered.

We are at a loss to understand why the Court of Appeals apparently hasn't gone into the details with reference to the deletion of Channel 8 and has approved the order as a routine matter. We realize that the Court has had many appeals from UHF operators who have attempted to keep their VHF competitors from going on the air, but in each of those cases, the Court of Appeals affirmed the Commission's action, holding that the public interest in having superior VHF services was uppermost and should prevail over the private competitive selfish interest of the UHF competitors and has held that UHF stations could not keep the use of VHF channels in areas to which they had been assigned from becoming realities.[56]

But, in the *Peoria* case, the Court of Appeals completely reversed itself and followed the new doctrine of the Commission of equalizing competition by giving economic protection to the inferior UHF services, completely contrary to the *Sanders* case, decided by this Court. The Court of Appeals by approving this new doctrine of economic protection has thrown the allocation and licensing procedure of the Commission in a state of confusion to where it is necessary that this Court review this case, which has been one of the hardest fought cases in the country and establish guides and buoys for future allocations, processing and licensing by the Commission.

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[56] Springfield Television Broadcasting Corp. v. F.C.C., U.S.C.C.A.D.C. dated June 19, 1958 (not reported); Winnebago Television Corp. v. United States, U.S.C.C.A.D.C., July 2, 1958 (not reported); Jacksonville Journal Co. v. F.C.C., 246 F. 2d 699; Coastal Bend Television Company v. F.C.C., 234 F. 2d 686; Gerico Investment Co. v. United States, 240 F. 2d 410; Van Curler Broadcasting Corp. v. United States, 236 F. 2d 727.

CONCLUSION

In the *Sanders* case, *supra,* this Court concluded that:

> "Plainly it is not the purpose of the Act to protect a licensee against competition but to protect the public."

In the *Allentown* decision, *supra,* this Court said:

> "Fairness to communities is furthered by a recognition of local needs for a community radio mouthpiece."

The essence of proper administrative functions by the Commission is to apply facts to a standard established by a legislative action (Congress). Only Congress can change that standard. When an administrative agency (Commission) seeks to add to or alters that standard it usurps the legislative function. For a court of record (Circuit Court of Appeals) to affirm such administrative action is to surrender its judicial power and to assert or assume legislative powers. Whether a new standard should be established is for Congress.

Neither the Court or the Commission should seek to amend in in this Case Section 307B, Section 303G or any other sections of the Communications Act by attempting to read into the act the doctrine of economic protection and equalization of competition completely foreign and contrary to the intent and mandate provisions of the Communication Act and to the decisions of this Court of many years standing. While the Commission may allocate channels either by passing upon specific applications or by way of rule making "or encourage the large ror more effective use of radio" as authorized by Section 303G, the mandate of Section 307B must be observed whichever procedure is involved. The Commission has disregarded this Provision in this case.

Certainly Peoria, the second city in Illinois and next to Chicago in population within the State and located in the heart of Illinois, is entitled in all fairness to have its one

superior service VHF Channel 8 to serve, and which is needed to cover its large metropolitan trading area (since none of the UHF stations' duplicatory signals will ever cover the Peoria trading area) which it has battled long and hard for—over six years now. It would be a strange sort of justice that would say the private interest of a United States Senator from Oklahoma would prevail over the public interest of more than one-half million citizens in the Peoria area and the great State of Illinois, the fourth largest State in the Union. Peoria's only hope for another station, in fact, is through VHF Channel 8.

Only this Court can prevent a gross miscarriage of justice.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted:

TIMOTHY W. SWAIN
MISHAEL O. GARD
Counsel for Petitioner
912 Central National
Bank Building
Peoria, Illinois

Of Counsel:

SWAIN, JOHNSON, GARD & CATION
912 Central National Bank Bldg.
Peoria, Illinois

July 30, 1958.

PETITIONER'S APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,768

WIRL TELEVISION COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS
TELE-VIEWS NEWS COMPANY,
AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,
MID ILLINOIS TELEVISION COMPANY,
ILLIWAY TELEVISION, INC.
HILLTOP BROADCASTING COMPANY,
WMBD, INC.,
WEST CENTRAL BROADCASTING COMPANY, INTERVENORS.

No. 13,769
No. 13,912

WIRL TELEVISION COMPANY, APPELLANT,

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE
TELE-VIEWS NEWS COMPANY,
AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,
MID ILLINOIS TELEVISION COMPANY,
ILLIWAY TELEVISION, INC.,
HILLTOP BROADCASTING COMPANY,
WMBD, INC.
WEST CENTRAL BROADCASTING COMPANY, INTERVENORS.

On Appeals and on Petition to Review Orders of the Federal Communications Commission

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Decided March 27, 1958

Messrs. Ben C. Fisher and *Timothy W. Swain,* with whom *Messrs. Charles V. Wayland, Charles F. Duvall, John P. Southmayd* and *Richard Hildreth* were on the brief, for petitioner in No. 13,768 and appellant in No. 13,769 and No. 13,912.

Mr. Richard A. Solomon, Assistant General Counsel, Federal Communications Commission, with whom *Messrs. Warren E. Baker,* General Counsel, Federal Communications Commission, *John J. O'Malley, Jr.,* Counsel, Federal Communications Commission, and *Henry Geller,* Attorney, Department of Justice, were on the brief, for respondent in No. 13,768 and appellee in Nos. 13,769 and 13,912. *Mr. Daniel R. Ohlbaum, Counsel,* Federal Communications Commission at the time record was field, also entered an appearance for respondent Federal Communications Commission, in No. 13,768. *Mr. Daniel M. Friedman,* Attorney, Department of Justice, also entered an appearance for respondent United States of America, in No. 13,768.

Mr. Vernon L. Wilkinson, with whom *Mr. James A. McKenna, Jr.,* was on the brief, for intervenor American Broadcasting-Paramount Theatres, Inc., *Messrs. Vernon L. Wilkinson* and *James A. McKenna, Jr.,* also entered appearances for intervenor Tele-News Company.

Mr. Harold D. Cohen, with whom *Mr. W. Theodore Pierson* was on the brief, for intervenor WMBD, Inc., *Messrs. Vernor C. Kohlhaas* and *Nad A. Peterson* also entered appearances for intervenor WMBD, Inc., in Nos. 13,768 and 13,769.

Messrs. Marcus Cohn and *Stanley S. Neustadt* were on the brief for intervenors Illiway Television, Inc., and Hilltop Broadcasting Company. *Mr. Paul Dobin* also entered an appearance for intervenors Illiway Television, Inc., and Hilltop Broadcasting Company.

Messrs. Jack P. Blume and *Peter Shuebruk* were on the brief for intervenor West Central Broadcasting Company. *Mr. Benito Gaguine* also entered an appearance for intervenor West Central Broadcasting Company.

Mr. Harry J. Daly and *Mrs. Lenore G. Ehrig* entered appearances for intervenor Mid Illinois Television Company.

Before PRETTYMAN, FAHY and BURGER, *Circuit Judges.*

BURGER, *Circuit Judge:* In 1952, after several years of consideration, the Commission allocated television channels to various areas throughout the country. Peoria, Illinois, was allotted two UHF channels[1] and one VHF channel, channel 8. Two applicants successfully applied for the two UHF channels, began broadcasting in 1953 and are still in operation. Appellant, having no desire to secure a UHF channel, applied for VHF channel 8, the only VHF channel allotted to Peoria, even though, as was expected, there was competition for channel 8. A comparative hearing on channel 8 was begun in the summer of 1953. On June 29, 1956, the Commission affirmed the examiner's initial decision (rendered November 1954) awarding appellant a construction permit for channel 8. However, the permit contained two conditions: (1) construction of the station was to await the outcome of a separate rule making proceeding begun on June 26, 1956, to consider removal of channel 8 from Peoria; and (2) "The Commission may, without further proceedings, substitute for channel 8, such other channel as may be assigned to Peoria." In March 1957, the separate rule making proceedings ended, with the result that channel 8 was removed from Peoria, and two new UHF channels, 25 and 31, substituted. Two months later appellant's license was modified to read UHF channel 25 instead of VHF channel 8. Appellant did not and does not now want a UHF channel, and asks us to direct the Commission to restore channel 8 to Peoria, or at least to require the Commission to hold a full evidentiary hearing, in which the burden of showing the need for removal of channel 8 from Peoria would rest upon the Commission.

The separate rule making proceedings which led to removal of VHF channel 8 from Peoria were held in re-

sponse to a nationwide problem concerning UHF television in general.[2] We have earlier adverted to Commission proceedings which ended in 1952, and resulted in allocations of television channels throughout the country. In 1952 UHF was believed to have a healthy future[3] and many communities were "intermixed," that is, allotted both UHF and VHF channels, so as to encourage the development of UHF television. It was thought that UHF and VHF could compete effectively with each other. As time passed, however, UHF did not progress as rapidly as had been hoped, and in many "intermixed" areas UHF televisers were in straits,[4] because the audiences, networks and advertisers preferred the superior VHF outlets.[5]

In response to this problem the Commission in 1955 began proceedings to consider the feasibility of "de-intermixture," *i.e.*, making all channels in any one area either VHF or UHF, but not an intermixture of both. The assumption was that UHF (70 channels) had an important place in future broadcasting, because traffic in the near future would probably saturate the limited VHF band (12 channels). Therefore, it was desirable to encourage the development of UHF as rapidly as possible. One way to do this was to remove the competition of VHF in some communities. Twice the Commission considered whether to "de-intermix" Peoria,[6] among several other selected areas, and each time concluded that selective de-intermixture was not a solution to the nationwide problem.

On June 26, 1956, the Commission proposed to explore the possibilities of shifting all or most television broadcasting to the UHF band. The Commission added:

> "Since some years would be required in any event for the full implementation of an all-UHF system, the Commission believes that steps should be taken in the meantime to improve the opportunities for effective competition among a greater number of stations. As already indicated, a basic choice in many markets at

> this time lies between the elimination of VHF channel assignments to create improved opportunities for UHF broadcasting and, alternatively, the assignment of additional local VHF channels."

Consequently, an "interim" proceeding was begun, involving 13 communities, in nine of which (including Peoria) it was proposed to delete the existing VHF allocations. In the course of these separate proceedings, appellant, as did a number of others,[7] filed comments relative to Peoria. It urged, *inter alia,* that deletion of Peoria's VHF channel

> "Would leave a large area where no other service would be available, and that the UHF stations could, because of local circumstances, compete effectively with one VHF station."[8]

Consideration continued until March 1957, when the Commission decided to remove Peoria's channel 8 and substitute two UHF channels, in addition to the two already operating.[9] Thus, Peoria was finally de-intermixed after three earlier decisions to the contrary. Later (as a logical corollary) appellant's permit for VHF channel 8 was amended without further proceedings to grant UHF channel 25 instead, this right having been expressly reserved in the initial conditional grant of the permit.

Appellant raises a number of claims, chiefly that the Commission *acted arbitrarily* in removing channel 8 from Peoria in the *rule making proceeding.* The record discloses an impact on this case of two kinds of Commission action—rule making (quasi-legislative) and adjudicative (quasi-judicial).[10] The proceeding on *appellant's application for a permit was adjudicative;* the proceeding *now* before us culminating in the *deletion* of UHF channel 8 from Peoria, was *rule making.* Appellant's standing to challenge is not the same with respect to both proceedings. We *find no error in the adjudicative proceeding* and indeed appellant asserts none, except as to the prize to be awarded to the winner. Except that the permit grant was expressly conditioned on the outcome of the rule making proceeding, appellant was granted what it sought.

The net effect of the two proceedings is that appellant received not the VHF channel 8 it wanted but what amounted in a sense to a "consolation prize" in the form of UHF channel 25 which it did not want. But this situation is a consequence of the Commission's exercise of its rule making power and its acknowledged authority to impose the conditions which were contained in the grant of the VHF channel 8 permit.

As we said in the *Coastal Bend* case,[11] "It is for the Commission, not the courts, to pass on the wisdom of a channel allocation scheme," provided the decision has an adequate legal and factual basis and we find such a basis in the present case. The charge of arbitrariness is not well taken. The long range goal of the Commission was to encourage UHF, and removal of potential VHF competition is a rational choice of means to achieve this goal. The short range, or "interim" goal, was to "improve the opportunities for effective competition among a greater number of stations." It was not arbitrary to conclude that the goal would be better approached in Peoria by allotting it four technically equal UHF channels, rather than one superior VHF channel and two inferior UHF channels. Appellant's only hope was to demonstrate, in the rule making proceeding, that public interest required that channel 8 remain in Peoria, or that considerations of fairness to appellant overbalanced the public interest in removal of channel 8. Its views were presented in *that* proceeding, *but were not adopted,* and we can see no basis for saying the Commission's decision was beyond its authority, or that the underlying fact findings were not supported by substantial evidence, or that appellant was denied the procedural rights due a protesting party in a rule making proceeding.

We have considered the other contentions of appellant and find in them no basis for reversing the action of the Commission.

Affirmed.

PETITIONER'S APPENDIX "B"

Amendment V of the Constitution of The United States.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Communications Act of 1934, As Amended.

Act of June 19, 1934, c. 652, Sec. 1 et seq., 48 Stat. 1064, U.S.C.A., Title 47, Sections 151 et seq.

Section 303(f):

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter; Provided, however, That changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this chapter will be more fully complied with. June 19, 1934, c. 652, Sec. 303, 48 Stat. 1082, as amended May 20, 1937, c. 229, Sec. 5, 6 (a, b), 50 Stat. 190, 191. 47 U.S.C.A. 303(f).

Section 303 (g) (as amended, 50 Stat. 190, 191, 47 USCA 303(g)):

Sec. 303(g). Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

Section 307(b) (as amended 49 Stat. 1475, 66 Stat. 714, 47 USCA 307(b)):

Sec. 307(b). "In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

Section 309(b) (as amended, 66 Stat. 715, 68 Stat. 35, 70 Stat. 3, 47 USCA 309(b)):

Sec. 309(b). "If upon examination of any such application the Commission is unable to make the finding specified in subsection (a), it shall forthwith notify the applicant and other known parties in interest of the grounds and reasons for its inability to make such finding. Such notice, which shall precede formal designation for a hearing, shall advise the applicant and all other known parties in interest of all objections made to the application as well as the source and nature of such objections. Following such notice, the applicant shall be given an opportunity to reply. If the Commission, after considering such reply, shall be unable to make the finding specified in subsection (a), it shall formally designate the application for hearing on the grounds or reasons then obtaining and shall notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. The parties in interest, if any, who are not notified by the Commission of its action with respect to a particular application may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest at any time not less than ten days prior to the date of hearing. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate but in which both the burden of proceeding with the introduction of evidence upon any issue specified by the Commission, as well as the burden of proof upon all such issues, shall be upon the applicant.

Section 316 (as added 66 Stat. 717, 47 USCA 316):

Sec. 316(a). "Any station license or construction permit may be modified by the Commission either for a limited time

or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with. No such order of modification shall become final until the holder of the license or permit shall have been notified in writing of the proposed action and the grounds and reasons therefor, and shall have been given reasonable opportunity, in no event less than thirty days, to show cause by public hearing, if requested, why such order of modification should not issue: PROVIDED, That where safety of life or property is involved, the Commission may by order provide for a shorter period of notice.

(b). In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission."

Administrative Procedure Act.

Act of June 11, 1956, c. 324, 60 Stat. 237, 5 USCA 1001-1011.

Section 2(c). (60 Stat. 237, as amended 60 Stat. 918, 60 Stat. 993, 61 Stat. 37, 61 Stat. 201, 62 Stat. 99, 5 USCA 1001(c)):

Sec. 2(c). Rule and Rule Making.—"Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

Section 2(d) (5 USCA 1001(d)):

Sec. 2(d). Order and Adjudication.—"Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including

licensing. "Adjudication" means agency process for the formulation of an order.

Section 2(e) (5 USCA 1001(e)):

Sec. 2(e). License and Licensing.—"License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification or conditioning of a license.

Section 5. (60 Stat. 239, 5 USCA 1004):

Sec. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to Sec. 11; (3) proceedings in which decisions rest solely in inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives.

(a) Notice.—Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(b) Procedure.—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with Secs. 7 and 8.

(c) Separation of Functions.—The same officers who preside at the reception of evidence pursuant to Sec. 7 shall make the recommended decision or initial decision required by Sec. 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to Sec. 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

(d) Declaratory Orders.—The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controvresy or remove uncertainty.

Section 7 (60 Stat. 241, 5 USCA 1006):

Sec. 7. In hearings which Secs. 4 or 5 require to be conducted pursuant to this section.—(2) Presiding Officers.—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes or proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with Sec. 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency

shall determine the matter as a part of the record and decision in the case.

(b) Hearing Powers.—Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with Sec. 8, and (9) take any other action authorized by agency rule consistent with this Act.

(c) Evidence.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in acordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) Record.—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with Sec. 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

Section 8 (60 Stat. 242, 5 USCA 1007):

Sec. 8. In cases in which a hearing is required to be conducted in conformity with Sec. 7.—(a) Action by Subordinates.—In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or in cases not subject to subsection (c) of Sec. 5, any other officer or officers qualified to preside at hearings pursuant to Sec. 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

(b) Submittals and Decisions.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therfor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

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No. 242

IN THE

Supreme Court of the United States

October Term, 1958

WIRL TELEVISION COMPANY, *Petitioner,*

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, ILLIWAY TELEVISION, INC.; WMBD, INC.; TELE-VIEWS NEWS COMPANY, INC.; AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.; WEST CENTRAL BROADCASTING COMPANY; HILLTOP BROADCASTING COMPANY; and MID ILLINOIS TELEVISION COMPANY, *Respondents.*

On Petition for a Writ of Certiorari to The United States Court of Appeals for The District of Columbia Circuit

BRIEF FOR AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC. IN OPPOSITION

By JAMES A. MCKENNA, JR.

VERNON L. WILKINSON

McKenna & Wilkinson
1735 DeSales Street, N. W.
Washington 6, D. C.

Counsel for
AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

INDEX

	PAGE
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTE INVOLVED	2
STATEMENT	3
ARGUMENT	7
CONCLUSION	14

TABLE OF CASES

Federal Communications Commission v. Allentown Broadcasting Corp. 349 U.S. 358	12
Federal Communications Commission v. Sanders Brothers Radio Station, 309 U.S. 470	12
Federal Communications Commission v. Station WJR, 337 U.S. 265	13
Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co., 298 U.S. 266	12
Huntington Broadcasting Co. v. Federal Communications Commission, 89 U.S. App. D.C. 222, 192 F. 2d 33 (1951)	11
Jacksonville Journal Co. v. Federal Communications Commission, 101 U.S. App. D.C. 12, 246 F.2d 699 (1957)	5
Logansport Broadcasting Corp. v. United States, 93 U.S. App. D.C. 342, 210 F.2d 24 (1954)	14

STATUTES

Communications Act of 1934, as amended

Section 303(f) (47 U.S.C. Sec. 303(f))	13, 14
Section 303(g) (47 U.S.C. Sec. 303(g))	2, 3, 10, 12
Section 303(r) (47 U.S.C. Sec. 303(r))	13
Section 307(b) (47 U.S.C. Sec. 307(b))	2, 10, 11, 12
Section 316 (47 U.S.C. Sec. 316)	13, 14
Section 402 (47 U.S.C. Sec. 402)	8

through affiliated stations in a substantial number of other markets. In thus supplying television programs to the people of the United States, ABC is in direct competition with two other networks (CBS and NBC). The Commission is on record that networks are an integral and necessary part of television, and that healthy and effective competition among the networks is in the public interest.[6]

If the programs supplied by the networks are to be made available to the public, the networks must have "outlets" in the various markets of the United States. Unless a network can provide "clearances" for its programs, at least in the major and secondary markets of the country, the national advertiser is unwilling to sponsor network programs. Without the revenues thus provided by national advertisers, a network cannot for long underwrite the cost of expensive entertainment and public interest programing.

In the intermixed allocation table adopted by the Commission in 1952, in only 33 of the first 100 markets of the country was the Commission able to allocate three or more VHF channels; in 32 of the first 100 markets it was able to allocate only two VHF channels; and in the remaining 35 of the first 100 markets one or no VHF channels (J.A. 116-117). Thus, in 67 of the first 100 markets, it was apparent that one or more of the three national networks would have to depend on a UHF station as an "outlet" for its programs, or (alternatively) on a VHF station affiliated with another network. To complicate matters further,

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[6] In approving the ABC-United Paramount Theatres merger in February 1953 the Commission stated: "We have long recognized that network broadcasting is an integral and necessary part of radio, and we have more recently extended this recognition of the benefits of network broadcasting to the field of television. We have also recognized that the public interest is served by competition among the networks, both radio and television." 8 RR 541, 624 (1953); cf. *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 198.

in large metropolitan areas heavily saturated with VHF-only receivers, the advertiser was frequently unwilling to "order" such markets unless "clearance" was obtained on a VHF station, fully realizing (no matter how good the program) that only a small portion of the audience (those with all-channel receivers and UHF converters) would be able to view the program on a UHF station in such areas. Thus, the UHF stations in VHF areas, not being ordered for high-rated network shows, were unable to develop an audience, or induce set owners to convert existing VHF receivers (see J.A. 76-78, 79-88).

It soon became apparent, under such an allocation pattern, that in the larger markets with two or more VHF stations, and in the smaller markets upon the advent of a first VHF operation, the UHF stations were beginning to fold (see J.A. 63-75). Without network programs they lost audience, without audience they lost revenue, and without revenue they could not continue to operate.

ABC as a network was hard hit by these developments. With 32 of the first 100 markets restricted to two VHF allocations, and with UHF stations folding or not building in such markets, ABC was left without an outlet of its own in key markets (e.g., New Orleans, Louisville, Providence, Dayton, San Diego, etc.). And in a number of the 33 markets (among the first 100) to which the Commission had assigned three VHF channels, a like problem existed by reason of the fact that the second or third VHF channel in those markets was tied up in long drawn out comparative hearings (e.g., St. Louis, Miami, Boston, and Pittsburgh).

To aggravate the matter further from the standpoint of developing a third competitive network, in markets with only two VHF stations on the air, those stations generally affiliated with the older networks (NBC and CBS) with more programs to offer. This, too, resulted in a vicious spiral. Unable to obtain "clearances" for its programs on

the VHF stations in markets in which an advertiser was particularly interested, the advertiser refused to buy time on ABC, with the result that ABC was losing programs and accounts to its two competitors—all because of its inability to clear its program in major and secondary markets desired by the sponsor.

Believing that at least three competitive networks were in the public interest and that the public should not be deprived of access to the programs of all the networks, ABC took an active role in urging the Commission to modify the intermixture feature of its Sixth Report by establishing at least three equally competitive facilities—all-UHF or all-VHF—in as many markets as possible. Knowing that 12 VHF channels alone could not do that job, ABC urged the Commission to abandon the "intermixture" concept utilized in the Sixth Report in 1952, pointing out that UHF channels were going to waste in the larger markets upon the advent of a second VHF operation, and in the smaller markets on the advent of a first VHF station. ABC so argued in Docket No. 11532, where the Commission finally concluded to abandon its intermixture concept—to make use of UHF channels in areas where UHF was providing a satisfactory service, and to shift VHF channels from such areas (where experience had shown that they were killing off UHF operations) into predominantly VHF areas in need of additional service but where UHF could not gain a competitive foothold (13 RR 1571).

In comments supporting the Commission's proposal to deintermix Springfield, ABC pointed out what was happening to UHF in VHF areas, and the resulting loss of service to the public (J.A. 112-114). It reminded the Commission of the importance of effective network competition (J.A. 114-117). It noted that UHF has some advantages over VHF, in areas where it is not smothered by VHF signals (J.A. 118-119). ABC noted how the pro-

posed shift would satisfy each of the five criteria spelled out in Docket No. 11532 (J.A. 117-120). Finally, ABC submitted two highly significant charts (J.A. 122-123), showing the clearance problems which confront a network in markets with an inadequate number of equally competitive services, and the resulting inability of the public to have access to the programs of all three networks.

In the light of these and related comments, the Commission concluded (J.A. 183-209) that by shifting Channel 2 from Springfield and by reassigning that channel to both St. Louis and Terre Haute, Springfield would have two and possibly three television stations (instead of one), St. Louis would have four (instead of three) commercial operations, and Terre Haute would have a second station—thus providing more television service to the public and more effective competition among the three national networks in each of these three markets.

The foregoing action by the Commission implemented rather than contravened the requirements of the Communications Act. Section 303(g) of the Act places upon the Commission the responsibility of encouraging "the larger and *more effective use* of radio in the public interest." An intermixed system of channel allocations where the net effect of a VHF operation is to close down one or more existing UHF stations does not constitute an "*efficient,* and equitable distribution of *radio service*" within the meaning of Section 307(b). UHF "paper allocations" do not constitute "radio service."

"As the Commission has recognized from the outset, and has frequently reaffirmed, the 12 VHF channels alone, are not adequate to make possible sufficient outlets for a fully competitive television system." *Second Report on Deintermixture,* 13 RR 1571, 1575, para. 12 (1956). In fact, as the Commission itself concluded in its Sixth Report of April 1952, an additional 70 channels (available only in the UHF portion of the spectrum) are needed to provide a truly

nationwide competitive system (see J.A. 77-78, 79-80). But as events subsequent to 1952 showed, a policy of intermixing VHF and UHF channels in the same markets was resulting in less service rather than more service (13 RR 1571; see J.A. 81). Large markets which could support three or more television operations but which (because of the limited number of VHF channels) had received only two VHF assignments in 1952 were being restricted to two stations (both on VHF), with the UHF assignments going begging in those markets. Likewise, in smaller markets where the Commission originally allocated one VHF and one or more UHF channels, the UHF stations were folding with the advent of the VHF station (J.A. 63-75). It was unthinkable that the 70 UHF channels (a major portion of the television spectrum) should be allowed to go to waste (see J.A. 79-82).

Thus, under the evidence adduced in Docket No. 11747, the Commission was fully justified in deleting Channel 2 from Springfield, if for no other reason than to improve the number of competitive services in and around Springfield-Decatur and even though it had to place the deleted VHF channel "on ice" without reassigning it elsewhere—as it did in the *Vail Mills* and *Elmira* cases, likewise decided March 1, 1957. 22 FCC Reports 293; 22 FCC Reports 307. Technically speaking, therefore, petitioner is in no position to raise a Section 307(b) question (based on the comparative needs of Springfield and St. Louis) unless and until petitioner first shows that the retention of Channel 2 in Springfield would serve the "public interest." In the light of what has happened in other comparable sized markets to UHF stations, upon the advent of a first VHF operation, the Commission properly concluded that Springfield-Decatur would have more service (from multiple UHF operations) if VHF Channel 2 were deleted than if it were kept in that market (J.A. 198-200).

II.

After concluding that in any event Channel 2 should be deleted from Springfield (J.A. 192), the Commission then considered other areas to which Channel 2 might be assigned—VHF areas where the utilization of Channel 2 would mean an additional service with no adverse impact on UHF operations. In its Sixth Report the Commission had concluded that St. Louis was a market of sufficient size to warrant six commercial assignments (three VHF and three UHF). With the failure of "intermixture," it was apparent that St. Louis would eventually be limited to three commercial channels (all VHF). Similarly, Terre Haute had been allocated two frequencies in 1952, but with the VHF station getting on the air first, the UHF channel had no "takers." A second competitive service was obviously needed in that market. Since, as the Commission found, it was not in the public interest to leave Channel 2 in Springfield (where in all probability it meant the demise of the UHF stations in Springfield and Decatur), there was every reason not to let the channel go to waste. Under these circumstances, since the utilization of Channel 2 in Terre Haute and St. Louis would mean an additional service in each of these markets, with no deterrent effect on the growth and development of UHF, public interest considerations clearly dictated the reassignment of the deleted channel to those markets. This the Commission did (J.A. 198-202).

Such action, we submit, implemented rather than contravened the requirements of the Communications Act, including Section 307(b). The Commission's authority, by prior rule-making proceedings, to set aside one class of frequencies for "communities" of one type and a different class of frequencies for "communities" of another type has long been recognized. See *Huntington Broadcasting Co.* v. *Federal Communications Commission*, 89 U.S. App. D.C. 222, 192 F.2d 33 (1951). Thus, the Commission prop-

erly decided in Docket No. 11532 (by its Second Report on Deintermixture) to make greater use of UHF channels in areas where UHF is providing satisfactory service, and to shift VHF channels from such areas to VHF markets where UHF cannot hope to provide a competitive service. To that end, in the instant proceeding, it first decided to make Springfield-Decatur all-UHF—by deleting Channel 2 in that area. It was this action which aggrieved petitioner. What use was made of Channel 2 after it was lost to Springfield is of no moment to petitioner. But rather than allow the channel to go to waste, it was placed in two VHF areas which were in need of an additional service and where UHF "paper" allocations were not providing "radio service" (Terre Haute and St. Louis).

In short, by deleting Channel 2 in Springfield (and substituting UHF channels therefor) and by reassigning that channel to both Terre Haute and St. Louis, such action meant that Springfield-Decatur would have three or more commercial stations (instead of one), St. Louis would have four (instead of three), and Terre Haute would have a second station.[7] In thus providing more television service to the public in those areas and more effective competition among all three networks, the Commission's action implemented rather than contravened the requirements of Sections 303(g) and 307(b) of the Act (47 U.S.C. Secs. 303(g) and 307(b)). This Court's decisions in the *Nelson Brothers*, *Allentown* and *Sanders* cases, on which

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[7] Subsequent developments fully support the wisdom of the Commission's action. As a result of the action here challenged, the programs of all three networks are now available in the St. Louis area. Springfield-Decatur (instead of being limited to one station on VHF Channel 2) has two UHF operations (stations WTVP and WICS); it has channels available (when the instant litigation is concluded) for a third operation. In Terre Haute, where the UHF had gone begging for five years, multiple applications have been filed requesting authority to establish a second service in that market on VHF Channel 2.

petitioner relies (Pet. pp. 12, 13, 19, 20, 22-24), dealt with an entirely different problem and are in no way in conflict with the decision below.

CONCLUSION

The Commission's action here challenged was properly affirmed by the court below. There is no conflict of decision. The petition for a writ of certiorari should be denied.

Respectfully submitted,

By James A. McKenna, Jr.
Vernon L. Wilkinson

McKenna & Wilkinson
1735 DeSales Street, N.W.
Washington 6, D. C.

Counsel for
American Broadcasting-Paramount
Theatres, Inc.

August 29, 1958

SUPREME COURT. U. S.

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JAMES R. BROWNING, Clerk

No. 235

IN THE

Supreme Court of the United States

October Term, 1958

SANGAMON VALLEY TELEVISION CORPORATION, *Petitioner,*

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, SIGNAL HILL TELECASTING CORPORATION, WMAY-TV, INCORPORATED, AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., and PLAINS TELEVISION CORPORATION, *Respondents.*

On Petition for a Writ of Certiorari to The United States Court of Appeals for The District of Columbia Circuit

BRIEF FOR PLAINS TELEVISION CORPORATION IN OPPOSITION

By JAMES A. MCKENNA, JR.

VERNON L. WILKINSON

McKenna & Wilkinson
1735 DeSales Street, N. W.
Washington 6, D. C.

Counsel for
PLAINS TELEVISION CORPORATION

WILSON - EPES PRINTING CO - RE 7-6002 - WASHINGTON 1, D. C.

PAGE

OPINIONS BELOW 1
JURISDICTION 2
QUESTIONS PRESENTED 2
STATUTE INVOLVED 2
STATEMENT 2
ARGUMENT 3
CONCLUSION 8

TABLE OF CASES

Federal Communications Commission v. Allentown Broadcasting Corp., 349 U.S. 358 8
Federal Communications Commission v. Sanders Brothers Radio Station, 309 U.S. 470 8
Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co. 298 U.S. 266 8
Huntington Broadcasting Co. v. Federal Communications Commission, 89 U.S. App. D.C. 222, 192 F.2d 33 (1951) 7

STATUTES

Communications Act of 1934, as amended
Section 303(g) (47 U.S.C. Sec. 303(g)) 2, 5, 7
Section 307(b) (47 U.S.C. Sec. 307(b)) 2, 5, 6, 7
Judicial Code
Section 1254(1) (28 U.S.C. Sec. 1254(1)) 2

MISCELLANEOUS

Television Allocation Proceedings of the FCC:
22 FCC Reports 293 (Vail Mills) 6
22 FCC Reports 307 (Elmira) 6
22 FCC Reports 318 (Springfield-St. Louis) 1
1 Pike & Fisher, Radio Regulation Pt. III, 91:661-665 3
13 Pike and Fisher Radio, Regulation 1571 ..... 3, 5, 7

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BRIEF FOR PLAINS TELEVISION CORPORATION IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. 1a-2a) is reported at 225 F.2d 191. The Report and Order of the Federal Communications Commission there affirmed is reported in 22 FCC Reports 318 (1957), *sub nom. Television Allocations in Springfield, Ill.-St. Louis, Mo. Areas* (J.A. 183-209).

JURISDICTION

The judgment of the court of appeals was entered on May 1, 1958. The petition for certiorari was filed on July 30, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether the action of the Federal Communications Commission, deleting VHF Channel 2 and substituting UHF channels therefor in Springfield, Ill., a predominantly UHF area, encouraged "the larger and more effective use of radio in the public interest" (47 U.S.C. Sec. 303(g)).
2. Only in the event the foregoing question is answered in the negative is petitioner in a position to complain of the reassignment of Channel 2 elsewhere, and to raise the issue whether the reassignment of Channel 2 to St. Louis and Terre Haute contravened Section 307(b) of the Communications Act (47 U.S.C. Sec. 307(b)).

STATUTE INVOLVED

Section 303(g) of the Communications Act of 1934, as amended (47 U.S.C. Sec. 303(g)), provides:

> Sec. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall—
>
> . . . .
>
> (g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest; . . .

STATEMENT

In the interest of avoiding needless repetition, respondent Plains Television Corporation adopts the factual

Statement contained in the Brief in Opposition filed herein by respondent American Broadcasting-Paramount Theatres, Inc.

ARGUMENT

I

Proceeding in 1952 on the assumption (then by no means unjustified) that the allocation of VHF and UHF channels to the same markets would compel the manufacture of nothing but all-channel receivers, the Commission in its Sixth Report allocated both UHF and VHF channels in as many markets as possible.[1] But subsequent developments soon demonstrated that in smaller markets to which a single VHF channel was allocated, and in the larger markets where two VHF channels were in use, the 70 UHF channels were becoming "paper allocations" (see J.A. 63-75). Since the 12 VHF channels were inadequate by themselves to provide a nationwide competitive television service (13 RR 1571, para. 12), it was unthinkable that the 70 UHF channels should be allowed to go to waste (see J.A. 82).

Thus confronted with a situation where there were not enough VHF channels to go around, and with UHF channels not being utilized, it took no great acumen in 1956 to conclude, with 82 channels to work with, that the public would receive service from more stations if equally competitive UHF channels were used in areas where UHF was providing a satisfactory service, and if the VHF channels theretofore assigned to those areas (but still tied up in comparative hearings) were shifted to VHF markets where UHF had been unable to obtain a foothold. The Commission so concluded in its Second Deintermixture Report released June 26, 1956 in FCC Docket No. 11532 (13 RR 1571).

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[1] Sixth Report of April 14, 1952, 1 Pike and Fisher, *Radio Regulation* Pt. III, 91:661-665 (hereinafter cited as —— RR ——).

In line with that Report, the Commission instituted proceedings to deintermix Springfield and St. Louis (FCC Docket No. 11747)—by deleting Channel 2 therefrom and substituting UHF channels therefor, and by reassigning Channel 2 to St. Louis, a market obviously destined to become all-VHF (J.A. 1-2). Respondent Plains Television Corporation, the licensee of Station WICS, operating on UHF Channel 20 in Springfield, had long urged such action (J.A. 21), knowing that its UHF station in Springfield and the UHF station in nearby Decatur (Station WTVP) would be in jeopardy the moment Channel 2 went on the air in Springfield (see J.A. 196-197, para. 22). Respondent accordingly supported the Commission's proposal (J.A. 185-186, para. 6), pointing out that if Channel 2 were removed from Springfield it could be used not only in St. Louis but also in Terre Haute (J.A. 21-25; J.A. 185, para. 4).

By findings fully supported by the record, and in no way challenged by petitioner, the Commission found that central Illinois (Springfield-Decatur-Peoria) because of flat terrain was ideally suited for UHF propagation (J.A. 189, para. 10), that numerous UHF stations were operating in that area (J.A. 188-189, para. 8), that the vast preponderance of sets in the area were capable of picking up UHF signals (J.A. 189, para. 9), and that the deletion of Channel 2 would not create any significant "white area" (J.A. 191, para. 13). The Commission further found that by removing Channel 2 from Springfield and substituting UHF channels therefor, and by reassigning Channel 2 to St. Louis and Terre Haute, at least four markets would have additional stations: Springfield would have two or more stations (on UHF) instead of a single station on VHF Channel 2; the nearby city of Decatur (with no VHF channel allocated thereto) would continue to have a station of its own on UHF; St. Louis would have four commercial stations instead of three; and Terre Haute would have a second outlet (J.A. 198-202).

Despite the public interest benefits which would thus stem from deintermixing the Springfield-Decatur portion of central Illinois, petitioner argues that the Commission was foreclosed as a matter of law from taking the action which it did by reason of Section 307(b) of the Communications Act (47 U.S.C. Sec. 307(b)). Notwithstanding the admitted fact that the 12 VHF channels are not enough to provide a nationwide competitive television system, and notwithstanding the fact that UHF channels become "paper allocations" in markets the size of Springfield, when a VHF station commences operating therein, petitioner says that a VHF channel must be assigned to Springfield by reason of Section 307(b), regardless of the public interest consequences and even though such an allocation results in less service rather than more service (Pet. 13-23).

Neither the Communications Act nor this Court's decisions impose any such "straight jacket" on the Commission. Section 303(g) of the Communications Act places upon the Commission the responsibility of encouraging "the larger and *more effective use* of radio in the public interest" (47 U.S.C. Sec. 303(g)). The Commission found as a fact, amply supported by the record, and not challenged by petitioner here or in the court below (see Pet. 12), that the deletion of the Channel 2 allocation in Springfield would result in more stations and more service in central Illinois (Springfield-Decatur-Peoria) than would its retention in that area (J.A. 198-202). Accordingly, under the express authority contained in Section 303(g) of the Communications Act (47 U.S.C. Sec. 303(g)), the Commission was fully justified in deleting from Springfield the VHF channel which had been allocated to that market in 1952 on an assumption (since disproved) that VHF and UHF stations could exist side by side in the same market. *Second Report on Deintermixture*, 13 RR 1571 (1956). The Commission's action deleting Channel 2 from Springfield was fully warranted, if for no other reason than to improve the number of competitive tele-

vision services in and around Springfield-Decatur and even though the deleted VHF channel had been placed "on ice" without reassigning it elsewhere—as the Commission did in the *Vail Mills* and *Elmira* cases decided at the same time. 22 FCC Reports 293 (1957); 22 FCC Reports 307 (1957).

Petitioner, whose appeal from a decision of the Commission preferring a competing applicant for Channel 2 is still pending in the court below,[1] is aggrieved by the action *deleting* Channel 2 from Springfield, and *not by its reassignment elsewhere*. What use is made of Channel 2, in the event the public interest (as the Commission found) would be better served by its non-utilization in the Springfield-Decatur area, is of no moment to petitioner. Technically speaking, therefore, petitioner is in no position to raise a Section 307(b) question (based on the comparative needs of Springfield and St. Louis and/or Terre Haute), in view of the Commission's finding (not contested) that the non-utilization of Channel 2 in Springfield would result in more service rather than less service in that area (J.A. 198-202).

II

But even assuming *arguendo* that petitioner is in a position to invoke Section 307(b), the action here challenged implements rather than contravenes the Communications Act, including Section 307(b). An intermixed system of channel allocations where the net effect of a single VHF operation is to close down multiple UHF services does not constitute an "*efficient* and equitable distribution of *radio service*" within the meaning of Section 307(b) of the Communications Act (47 U.S.C. Sec. 307(b)). UHF "paper allocations" do not constitute "radio service."

The Commission's authority, by prior rule-making proceedings, to set aside one class of frequencies for "com-

[1] See Pet. p. 7, fn. 10.

munities" of one type and a different class of frequencies for "communities" of another type has long been recognized. See *Huntington Broadcasting Co.* v. *Federal Communications Commission,* 89 U.S. App. D.C. 222, 192 F.2d 33 (1951). Thus, the Commission properly decided in Docket No. 11532 (by its Second Report on Deintermixture) to make greater use of UHF channels in areas where UHF is providing satisfactory service, and to shift VHF channels from such areas to VHF markets where UHF cannot hope to provide a competitive service (13 RR 1571). To that end, in the instant proceeding, it first decided to make Springfield-Decatur all-UHF—by deleting Channel 2 in that area (J.A. 192). But rather than allow the channel to go to waste, it was placed in two VHF areas (Terre Haute and St. Louis) which were in need of additional service and where UHF "paper" allocations were not providing "radio service".

In short, by deleting Channel 2 in Springfield (and substituting UHF channels therefor) and by reassigning that channel to both Terre Haute and St. Louis, such action meant that Springfield-Decatur would have three or more commercial stations (instead of one). St. Louis would have four (instead of three), and Terre Haute would have a second station.[1] In thus providing more television service to the public in those areas and more effective competition among all three networks, the Commission's action implemented rather than contravened the requirements of Sections 303(g) and 307(b) of the Act (47 U.S.C.

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[1] Subsequent developments fully supported the wisdom of the Commission's action. As a result of the action here challenged, the programs of all three networks are now available in the St. Louis area. Springfield-Decatur (instead of being limited to one station on VHF Channel 2) has two UHF operations (stations WTVP and WICS); it has channels available (when the instant litigation is concluded) for a third operation. In Terre Haute, where the UHF had gone begging for five years, multiple applications have been filed requesting authority to establish a second service in that market on VHF Channel 2.

Secs. 303(g) and 307(b)). This Court's decisions in the *Nelson Brothers, Allentown,* and *Sanders* cases, on which petitioner relies (Pet. pp. 12, 13, 19, 20, 21-24), dealt with an entirely different problem and are in no way in conflict with the decision below.

CONCLUSION

The Commission's action here challenged was properly affirmed by the court below. There is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

By JAMES A. MCKENNA, JR.

VERNON L. WILKINSON

McKenna & Wilkinson
1735 DeSales St., N. W.
Washington 6, D. C.

Counsel for
PLAINS TELEVISION CORPORATION

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OCTOBER TERM, 1958

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REPLY BRIEF FOR PETITIONER

D. M. PATRICK
LESTER COHEN
STANLEY S. HARRIS
E. BALLETT PRETTYMAN, JR.
810 Colorado Building
Washington 5, D. C.

Attorneys for Petitioner

Of Counsel:

HOGAN & HARTSON
Washington, D. C.

INDEX TO CITATIONS

CASES: Page

Carroll Broadcasting Co. v. FCC, U.S. Ct. of App. for D.C. Cir., Case No. 14104 (July 10, 1958) 4

FCC v. Allentown Broadcasting Corp., 349 U.S. 358 (1955) 3

FCC v. Sanders Brothers Radio Station, 309 U.S. 470 (1940) 4

Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co., 289 U.S. 266 (1933) 3

Van Curler Broadcasting Corp. v. United States, 236 F.2d 727 (D.C. Cir.), *cert. denied*, 352 U.S. 935 (1956) 5

STATUTE:

Communications Act of 1934, as amended, § 307(b), 47 U.S.C. § 307(b) 2, 5

MISCELLANEOUS:

Hearings before Subcommittee on Legislative Oversight of House Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess (1958) .. 5

Sixth Report and Order on Television Allocations, 1 PIKE & FISCHER RADIO REG. 91:601 (1952) 3

Television Digest, February 16, 1957 4

Television Digest, August 23, 1958 4

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REPLY BRIEF FOR PETITIONER

1. Four briefs in opposition to the instant petition for writ of certiorari have been filed by five respondents. In each of those briefs, the respondents acknowledge the superiority of VHF over UHF television channels.[1] The Government incorporates its opposition brief in Case No. 242 into its argument here, and in that brief the Government specifically admits the "inequality between the two types of

[1] Brief for the United States and Federal Communications Commission, p. 4; Brief of Signal Hill Telecasting Corp., p. 7; Brief for Plains Television Corp., p. 4; Brief for American Broadcasting-Paramount Theatres, Inc., pp. 4-5.

channels and the preference of networks, advertisers, and audiences for VHF."[2]

Although respondents thus emphasize rather than contradict petitioner's explanation of the marked disparity between the two types of television services, not one of them offers a theory as to how the "fair and equitable" distribution requirement of section 307(b) could be applied without considering that disparity.

The Government concedes that the purpose of its move of Channel 2 was "improving opportunities for competition" in the cities affected.[3] This is precisely why this case is of such vital significance to the future administration of the Communications Act. The Act contains not one word with respect to any concept of competitive equality in certain cities; it *does* contain the clear statutory mandate that frequencies must be so allocated "among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." *A fortiori,* superior as well as inferior frequencies must be distributed fairly and equitably. Neither the Government nor any other respondent meets (or attempts to meet) this argument.

Not one opposition brief contends that the Commission gave any consideration to the relative needs of Springfield and St. Louis for the VHF channel which only one could have. No respondent contends

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[2] Brief for the United States and Federal Communications Commission in Opposition in Case No. 242, p. 4, n. 2, WIRL Television Co. v. United States.

[3] Brief for the United States and Federal Communications Commission, p. 3.

that the Commission made any findings with respect to the populations of Illinois and Missouri, or to the number of VHF channels which previously had been allocated to those respective states. Significantly, each respondent glosses over, with barely any reference, this Court's decisions in the *Nelson Brothers*[4] and *Allentown*[5] cases.

2. Respondents' briefs abound in statements to the effect that the Commission's action resulted in more television stations in the cities involved.[6] This simply is not true. The Commission moved channel 2 more than a year and a half ago (February 26, 1957), but neither Springfield nor St. Louis (nor Terre Haute) has even a single new station. Respondent Signal Hill was given channel 2 in St. Louis to become that city's fifth VHF station, but it had been on the air on its UHF channel prior thereto.[7] Respondent Plains remains as Springfield's only television station, and there has been no indication whatsoever that a second UHF station will ever be constructed in the Illinois capital.

Similarly, depriving Springfield of channel 2 has not helped UHF generally, despite respondents'

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[4] *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266 (1933).

[5] *FCC* v. *Allentown Broadcasting Corp.*, 349 U.S. 358 (1955).

[6] *E.g.*, Brief for the United States and Federal Communications Commission, p. 6; Brief of Signal Hill Telecasting Corp., p. 9; Brief for Plains Television Corp., pp. 4, 5, 7; Brief for American Broadcasting-Paramount Theatres, Inc., pp. 11, 12, 14.

[7] In its Sixth Report and Order—relied upon by respondents—the Commission stated that it was a "basic element" in its allocation plan that large cities should not receive "an undue share of the relatively scarce VHF channels." 1 PIKE & FISCHER RADIO REG. 91:601, 91:621 (1952).

unsupported claims to the contrary. Immediately prior to the Commission's action, there were 401 VHF stations and 95 UHF stations in the United States.[8] Today there are 444 VHF stations and only 86 UHF stations, with a total of 85 UHF stations having gone off the air.[9]

In sum, Springfield has been deprived of its only wide-coverage VHF allocation, and the capital area has been restricted to inferior television service, for no greater reason than to enhance the competitive positions of two existing stations. This, as we submitted in our petition, is violative of this Court's "free competition" holding in the *Sanders Brothers* case.[10] The public of Springfield and Illinois cannot be deprived of their fair and equitable share of superior television service simply to insulate existing stations against competition. As the United States Court of Appeals for the District of Columbia Circuit stated less than two months ago in applying this Court's *Sanders Brothers* doctrine:

> ". . . we think it is not incumbent upon the Commission to evaluate the probable economic results of every license grant. Of course the public is not concerned with whether it gets service from A or from B or from both combined. The public interest is not disturbed if A is destroyed by B, so long as B renders the required service."[11]

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[8] *Television Digest*, February 16, 1957, p. 7.

[9] *Television Digest*, August 23, 1958, pp. 1-2.

[10] *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470 (1940).

[11] *Carroll Broadcasting Co.* v. *FCC*, U. S. Ct. of App. for D.C. Cir., Case No. 14104 (July 10, 1958).

3. In its opposition brief (p. 8), the Government states that respondent Signal Hill—which was given channel 2—made "*ex parte* presentations with respect to the merits of the rule-making proceeding to various members of the Commission." It also claims that petitioner did likewise. The latter statement is not supported by the material cited by the Government. Petitioner did discuss the loss of Springfield's only VHF channel with the mayor of that city, and it is understood that the latter subsequently consulted with members of the Commission.[12] The testimony before the House Subcommittee on Legislative Oversight does not indicate that petitioner or any authorized representative of petitioner ever made any *ex parte* representations whatsoever in this case to any member of the Commission.

In any event the question before this Court is the lawfulness of the Commission's action in ignoring and violating the statutory mandate of section 307(b), and

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[12] *Hearings before Subcommittee on Legislative Oversight of House Committee on Interstate and Foreign Commerce*, pp. 814-815, May 28, 1958 (not yet officially printed). Parenthetically, such representations are not improper in a rule making proceeding. *See Van Curler Broadcasting Corp.* v. *United States*, 236 F. 2d 727, 730 (D.C. Cir.), *cert. denied*, 352 U.S. 935 (1956).

nothing else. The need for review and correction of the action here involved is both urgent and vital.

Respectfully submitted,

D. M. PATRICK
LESTER COHEN
STANLEY S. HARRIS
E. BARRETT PRETTYMAN, JR.
810 Colorado Building
Washington 5, D. C.

Attorneys for Petitioner

Of Counsel:

HOGAN & HARTSON
Washington, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

SANGAMON VALLEY TELEVISION CORPORATION,
PETITIONER

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

VICTOR R. HANSEN,
Assistant Attorney General,
Department of Justice, Washington 25, D. C.

WARREN E. BAKER,
General Counsel,
RICHARD A. SOLOMON,
Assistant General Counsel,
CHARLES C. McCARTER,
RUTH V. HEIL,
Counsel,
Federal Communications Commission, Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1958

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OPINIONS BELOW

The opinion of the court below (Pet. App. 1a–2a) is reported at 255 F. 2d 191. The basic decision of the Federal Communications Commission (R. 679–695) is reported at 22 F. C. C. 318, and its decision denying rehearing (R. 1103–1112) is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming the decision of the Commission, was entered on May 1, 1958. The petition for a writ of certiorari was

filed on July 30, 1958. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

Whether the Federal Communications Commission, in reassigning television channels in Springfield, Illinois; Terre Haute, Indiana; and St. Louis, Missouri, in order to provide a greater amount of television service to each of the communities involved, violated Section 307 (b) of the Communications Act.

STATUTE INVOLVED

The pertinent provision of the Communications Act of 1934 (48 Stat. 1084, as amended, 49 Stat. 1475, 66 Stat. 714; 47 U. S. C. 307 (b)) is set forth in the Petition at p. 2.

STATEMENT

The Federal Communications Commission on March 1, 1957, after full rule-making proceedings, adopted an order which modified Section 3.606 of its Rules, comprising a nationwide allocation of television channels, by transferring very high frequency (VHF) channel 2 from Springfield, Illinois, to Terre Haute, Indiana, and St. Louis, Missouri, and by adding ultra high frequency (UHF) channels 26 and 36 to those previously assigned to Springfield (22 F. C. C. 318, 22 F. R. 1484). As a result of this action, Springfield, which previously had been assigned one VHF channel (Channel 2) and two UHF channels (Channels 20 and 66), was now assigned four channels, all in the UHF portion of the television band.[1] At the same time,

[1] One of these channels was reserved for noncommercial, educational use.

St. Louis was provided with a fourth commercial VHF channel, and Terre Haute with a second VHF channel. Both of the latter cities had previously been assigned a number of UHF channels and retained these assignments with the exception of St. Louis UHF channel 36 which was reassigned to Springfield. Terre Haute, however, never had a station in operation on any of its UHF channels, and, while a number of permits had been issued for UHF stations in St. Louis, only one UHF station remained in operation at the time of the reallocation, and it was operating at a heavy annual loss.

The action of the Commission in shifting VHF and UHF channels in these areas was one of some nine actions taken on the same date in rule-making proceedings initiated for the purpose of improving opportunities for competition among a greater number of stations in individual communities by deleting VHF channels in established UHF markets and/or by adding VHF channels in predominantly VHF markets. Another of these rule-making proceedings (involving Peoria, Illinois, and the Tri-City area of Davenport, Rock Island and Moline in Iowa and Illinois) is now pending before the Court on petition for a writ of certiorari in *WIRL Television Company* v. *United States*, No. 242, this Term. The background of the Commission's efforts to find some effective way to use the 70 UHF channels to expand the nation's television service, is set forth in the Government's brief in opposition to certiorari in that case and is incorporated here.

In the instant proceeding, the Commission concluded that Springfield presented appropriate circumstances for deletion of a VHF channel from a UHF market under the criteria set forth in its June 26, 1956, Report and Order. The Commission found that the Springfield area was predominantly UHF, the terrain was ideally suited for UHF propagation, the vast majority of sets in the area were equipped to receive UHF transmission, and a number of UHF stations were providing satisfactory service. The Commission further found that although no predictable or significant portion of the Springfield viewing public would fail to receive satisfactory service if two UHF channels were substituted for the one VHF, retention of the VHF assignment to Springfield would seriously jeopardize the ability of the UHF stations to continue to provide service.[2] The Commission accordingly concluded that the deletion of VHF channel 2 from Springfield would "enhance the opportunities for effective competition among a great number of stations" in that community (R. 689). The Commission also concluded that reassignment of this VHF channel to St. Louis and Terre Haute would result in a "more effective and efficient utilization of the scarce VHF spectrum" in view of the "need and demand" for additional service in those primarily VHF markets which their existing UHF allocations could not, as a practical matter, provide (R. 689–690).

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[2] The Commission also found that deletion of the Springfield VHF channel, which provided parts of the Peoria area with VHF service, would implement its simultaneous decision to make the Peoria area all UHF (22 F. C. C. at 327).

Petitioner was an applicant in the comparative proceeding for channel 2 in Springfield. Shortly after commencement of these rule-making proceedings, the Commission issued a decision in the comparative hearing awarding the grant to another applicant, but conditioning it upon the outcome of the proceedings looking towards substitution of UHF channels for channel 2. Petitioner unsuccessfully sought reconsideration of the comparative grant and simultaneously participated fully in the rule-making proceeding, urging retention of channel 2 in Springfield. It both appealed from the denial of its application[3] and sought review, in this case, of the Commission's final determination to shift channel 2 from Springfield to the St. Louis-Terre Haute area.

On review, the Court of Appeals, in a *per curiam* opinion, unanimously affirmed the Commission's action. Rejecting petitioner's contention that the reassignment of channel 2 was "inconsistent with section 307 (b) of the Communications Act," the court stated (Pet. App. p. 2a):

> We are unable to sustain this attack. Upon the basis of a full hearing the Commission weighed the various factors involved and reached a reasoned decision within its competence. We find nothing arbitrary, capricious or otherwise illegal in the decision, and it accordingly is affirmed.

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[3] This action, *Sangamon Valley Television Corp.* v. *Federal Communications Commission*, Case No. 13,991 in the court of appeals below, was deferred by order of the court dated August 16, 1957, pending disposition of the instant case.

ARGUMENT

Petitioner's sole argument here (Pet. 12, 13), that the reassignment of channels in deleting Springfield's only VHF channel violates Section 307(b) of the Communications Act, is identical with a similar argument of the petitioner in *WIRL Television Company* v. *United States*, No. 242, this Term (Pet. 13–21), and is equally insufficient as a basis for a grant of certiorari. Here, as there, the objective of the Commission's action was not to protect the private interests of existing UHF stations, as petitioner contends, but to distribute frequencies in the manner best calculated to provide the greatest amount of actual television service to the states and communities involved. Indeed, here, as there, the decision of the Commission rests on findings of fact, approved by the court below, that Springfield, St. Louis, and Terre Haute would all be afforded an opportunity for satisfactory service by a greater number of stations if the VHF channel were reassigned from Springfield to Terre Haute and St. Louis (R. 689–690). There is nothing inconsistent with Section 307(b) in either the Commission's objective or its supporting findings, and the court of appeals correctly so held in affirming the Commission's action (Pet. App. 2a).

Since the decisions of the Commission and the court below comport with Section 307 (b), there is no merit in petitioner's claim of conflict with either *Federal Radio Commission* v. *Nelson Brothers Bond and Mortgage Co.*, 289 U. S. 266, or *Federal Communications Commission* v. *Allentown Broadcasting Corp.*, 349 U. S. 358. On the contrary, the instant case ac-

cords in full with this Court's construction of the statutory predecessor of Section 307 (b). In the *Nelson* case, this Court said (289 U. S. at 281):

> The command [of the statute] is that there shall be a "fair and equitable allocation of licenses, wave lengths, time for operation and station power to each of the States within each zone." *It cannot be said that this demanded equality between States with respect to every type of station.* * * * [Emphasis added.]

Moreover, in the *Allentown* case this Court gave express recognition (349 U. S. at 362) to the validity of the Commission view, also involved here, that the bringing of multiple services to significant communities was an appropriate consideration under Section 307 (b).

CONCLUSION

For the foregoing reasons stated here, and in the brief in opposition filed by the United States and the Commission in *WIRL, supra,* the petition for a writ of certiorari should be denied.

We believe it proper, however, to call the Court's attention to certain testimony given before the Subcommittee of Legislative Oversight of the House Committee on Interstate and Foreign Commerce on May 22, 26, and 28, 1958, and June 9, 10, and 11, 1958, subsequent to the decision by the court of appeals affirming the Commission's order. The testimony indicates that after the rule-making proceeding here had been initiated by Notice of Proposed Rulemaking, and while it was under consideration by the Commission, representatives of the St. Louis operator of a UHF station

who was interested in having a new VHF channel assigned to St. Louis, and representatives of the petitioner and the other applicant for VHF Channel 2 in Springfield, who were interested in retaining that channel in Springfield, made *ex parte* presentations with respect to merits of the rule-making proceeding to various members of the Commission.

These matters were not presented to the court below and are not presented by the petition. For this reason, the respondents do not and would not regard denial of certiorari as foreclosing appropriate consideration thereof by the court of appeals.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

VICTOR R. HANSEN,
Assistant Attorney General.

WARREN E. BAKER,
General Counsel,

RICHARD A. SOLOMON,
Assistant General Counsel,

CHARLES C. MCCARTER,
RUTH V. REEL,
Counsel,
Federal Communications Commission.

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